KANSAS V. HENDRICKS[1]: A WORKABLE STANDARD FOR "MENTAL ILLNESS" OR A PUSH DOWN THE SLIPPERY SLOPE TOWARD STATE ABUSE OF CIVIL COMMITMENT?

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> Nothing could be less fruitful than for this Court to be impelled into defining some sort of insanity test in constitutional terms.... It is simply not yet the time to write into the Constitution formulas cast in terms whose meaning...is not yet clear either to doctors or to lawyers.[2]

I. INTRODUCTION

All states have statutes that authorize involuntary civil commitment.[3] A state has two basic powers that authorize it to commit individuals: (1) parens patriae power and (2) police power.[4] Parens patriae power establishes a state's authority to commit the mentally and physically disabled who cannot care for

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1. 117 S. Ct. 2072 (1997).

2. Powell v. Texas, 392 U.S. 514, 536–37 (1968). Although in *Powell* the Court was asked to define legal insanity as a defense in criminal law, the Court's decision not to define this term bears heavily on civil commitment law. Like the insanity defense in criminal law, civil commitment is based on terms, such as "mental illness," that are not easily defined. *See* Jones v. United States, 463 U.S. 354 (1983); O'Connor v. Donaldson, 422 U.S. 563, 584 (1975) (Burger, C.J., concurring).

3. *See, e.g.*, ARIZ. REV. STAT. ANN. §§ 36–533 to 36–544 (West 1993); KAN. STAT. ANN. § 59–2957 (Supp. 1996); MASS. ANN. LAWS ch. 123, § 7 (Law. Co-op. Supp. 1997); N.J. STAT. ANN. § 30:4–27.10 (West 1997); *see also* John Q. La Fond & Mary L. Durham, *Cognitive Dissonance: Have Insanity Defense and Civil Commitment Reforms Made a Difference?*, 39 VILL. L. REV. 71, 105 n.176 (1994) (stating there were approximately 306,468 involuntary commitments in 1980).

4. *See* Addington v. Texas, 441 U.S. 418, 426 (1979); SAMUEL JAN BRAKEL ET AL., THE MENTALLY DISABLED AND THE LAW 24 (1985); Deborah L. Morris, Note, *Constitutional Implications of the Involuntary Commitment of Sexually Violent Predators—A Due Process Analysis*, 82 CORNELL L. REV. 594, 604 (1997).

themselves.[5] A state's police power authorizes it to commit individuals who endanger society.[6]

The Supreme Court has limited use of police power such that states can commit only those individuals who are both "mentally ill and dangerous."[7] This Note focuses on the substantive due process concerns associated with this standard.

Although widely adopted, involuntary civil commitment laws raise serious substantive due process concerns. Those civilly committed by a state not only lose their right to be free from state-imposed confinement but also are stigmatized as mentally ill.[8] The Court has repeatedly recognized that "liberty from bodily restraint...[is] the core of the liberty protected by the Due Process Clause."[9] Similarly, the stigma imposed by civil commitment can have "a very significant impact on...[an] individual."[10]

In general, state restriction of fundamental individual rights invokes heightened judicial scrutiny under the Due Process Clause of the Constitution.[11] True to this point, the Court has stated that "civil commitment for any purpose constitutes a *significant* deprivation of liberty,"[12] and closely scrutinizes the

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5. BRAKEL ET AL., *supra* note 4, at 24.

6. *Id.*

7. *Jones*, 463 U.S. at 362; *see* Foucha v. Louisiana, 504 U.S. 71, 80 (1992); *Addington*, 441 U.S. at 426.

8. *See* Vitek v. Jones, 445 U.S. 480, 491–92 (1980).

9. Greenholtz v. Nebraska Penal Inmates, 442 U.S. 1, 18 (1979) (Powell, J., concurring in part and dissenting in part); *see also* Ingraham v. Wright, 430 U.S. 651, 673–74 (1977) (stating that constitutional liberty interest includes "freedom from bodily restraint").

10. *Vitek*, 445 U.S. at 492.

11. 2 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW § 15.7, at 427 (2d ed. 1992). Under a strict scrutiny standard of review, the government must demonstrate that the law is "narrowly tailored to promote a compelling or overriding interest." *Id.* § 15.4, at 402.

12. *Addington*, 441 U.S. at 425 (emphasis added). Many commentators contend that the Court uses strict scrutiny, or some other form of heightened review, in its due process analysis of civil commitment laws. *See* John Kip Cornwell, *Protection and Treatment: The Permissible Civil Detention of Sexual Predators*, 53 WASH. & LEE L. REV. 1293, 1316–19 (1996) ("U.S. Supreme Court precedent provides strong historical support for the application of midlevel review to laws effecting involuntary psychiatric commitment."); C. Peter Erlinder, *Minnesota's Gulag: Involuntary Treatment for the "Politically Ill,"* 19 WM. MITCHELL L. REV. 99, 155 n.330 (1993) (stating that civil commitment infringes upon a fundamental right, and thus "requir[es] a compelling state interest to justify state action"); Morris, *supra* note 4, at 599 ("Because of the importance of an individual's right to liberty..., civil commitment schemes must pass the Court's strict scrutiny test." (footnote omitted)). Some of these conclusions, however, were based on case law inapposite to the issue of civil commitment for mentally ill and dangerous individuals. For example, Morris based her conclusion on language in *United States v. Salerno*, 481 U.S. 739 (1987), a case dealing solely with commitment of dangerous, nonmentally ill persons. *See* Morris, *supra* note 4, at 599 & nn.30–31 (citing *Salerno* for language

procedural safeguards a state provides to involuntarily committed individuals.[13] In sharp contrast, however, the Court has deferred to legislative decisions regarding the substantive components of civil commitment laws. A state can constitutionally confine an individual who is both mentally ill and dangerous,[14] and the Court has "left to legislators the task of defining [mental illness]"[15]:

> We have recognized repeatedly the "uncertainty of diagnosis in this field and the tentativeness of professional judgment. The only certain thing that can be said about the present state of knowledge...regarding mental disease is that science has not reached finality of judgment...." The lesson we have drawn is not that government may not act in the face of this uncertainty, but rather that courts should pay particular deference to *reasonable legislative judgments.*[16]

The Court's deference toward legislative judgments regarding "mental illness" has caused concern of a potential "slippery slope" toward state abuse of civil commitment schemes.[17] This concern came to a head in *Kansas v. Hendricks*, a case regarding the constitutionality of Kansas' Sexually Violent Predator Act.[18] That Act permitted the state to civilly commit convicted or charged sexual offenders who were found to be "sexually violent predators."[19] Professor John La Fond was among several commentators who criticized the Act:

> If upheld, this [sexually violent predator] law will essentially permit a legislature to use lifetime preventive detention on any group of offenders who have served their prison terms and have been, or will be, released. All that is required to accomplish such a goal is a statute that labels criminals who have committed a

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regarding a "compelling" state interest requirement). The *Salerno* Court did not have an opportunity to defer to state legislation regarding mental illness because the government did not even purport to require mental illness. *See Salerno*, 481 U.S. at 743. Therefore, *Salerno* should not be relied on to establish the standard of review for civil commitment of mentally ill and dangerous individuals.

13. *See, e.g., Addington*, 441 U.S. at 427 (holding that a state must prove requirements of civil commitment by more than a mere preponderance of the evidence standard to assure it confines only those it has an interest in confining).

14. *See* Foucha v. Louisiana, 504 U.S. 71, 80 (1992); *Addington*, 441 U.S. at 426.

15. Kansas v. Hendricks, 117 S. Ct. 2072, 2081 (1997).

16. Jones v. United States, 463 U.S. 354, 365 n.13 (1983) (quoting Greenwood v. United States, 350 U.S. 366, 375 (1956)) (second omission in original) (citations omitted) (emphasis added).

17. *See, e.g.*, John Q. La Fond, *Washington's Sexually Violent Predator Law: A Deliberate Misuse of the Therapeutic State for Social Control*, 15 U. PUGET SOUND L. REV., 655, 698–99 (1992); Morris, *supra* note 4, at 630.

18. *See Hendricks*, 117 S. Ct. at 2076. Kansas' law was patterned on a 1990 Washington statute. *In re* Hendricks, 912 P.2d 129, 131 (Kan. 1996), *rev'd sub nom.* Kansas v. Hendricks, 117 S. Ct. 2072 (1997).

19. *See* KAN. STAT. ANN. § 59–29a07 (Supp. 1996).

> single crime as suffering from a "mental abnormality" that makes them "likely to reoffend" and authorizes their lifetime confinement for "treatment." Simply put, the predator commitment law has detached involuntary commitment from the medical model of mental illness and *bona fide* treatment.
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> Once detached, literally no stopping point exists. The logic of the predator commitment law can be applied to people who drive while under the influence of alcohol, who assault their domestic partners, who use crack cocaine, or who commit whatever the new "crime-of-the-month" happens to be.[20]

La Fond believed that if the Court allowed sexually violent predator statutes, like the Kansas law, to stand, no ending point for state civil commitment would exist.

The Kansas Supreme Court found the Act in violation of substantive due process for reasons similar to those expressed by La Fond.[21] In 1997, however, the United States Supreme Court reversed the Kansas court's decision, holding the Act constitutional.[22]

The issue, now, is whether La Fond was correct. Since the Court upheld Kansas' Sexually Violent Predator Act, has civil commitment law been pushed down the "slippery slope," or did the Court sufficiently limit its holding such that it provided a workable standard for mental illness, and such that states will not be able to "abuse" civil commitment schemes to confine "nonmentally ill" people?

This Note will focus on the above issue. To this end, Part II analyzes the Supreme Court decisions prior to *Hendricks* and Part III examines Kansas' Sexually Violent Predator Act, focusing on the portions the Kansas Supreme Court found significant in striking down the Act. Part IV reviews the decision by the *Hendricks* Court, focusing on the substantive due process issues. Finally, Part V discusses the legitimacy of the "slippery slope" concerns after *Hendricks*.

II. SUPREME COURT DECISIONS IN THE AREA OF "MENTAL ILLNESS" AND COMMITMENT

The Supreme Court decided many important cases in the area of mental illness and confinement prior to *Kansas v. Hendricks*. Although the Court never established an explicit constitutional standard for the type of "mental illness"

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20. La Fond, *supra* note 17, at 698–99. Although Professor La Fond was referring to Washington's Sexually Violent Predator Act, Kansas based its law on Washington's, and the two statutes are virtually identical. *See In re Hendricks*, 912 P.2d at 131.

21. *In re Hendricks*, 912 P.2d at 138 (ruling that the Act's "mental abnormality" requirement was not constitutionally sufficient); *see infra* notes 162–63 and accompanying text.

22. *Hendricks*, 117 S. Ct. at 2081; *see infra* Part IV. The Court also upheld the Act against double jeopardy and ex post facto claims. *Id.* at 2086.

necessary to confine an individual, it did construct several constitutional rules that must be considered in conjunction with *Hendricks*. The following four cases set forth the most important of these rules.

A. Jackson v. Indiana[23]

Jackson v. Indiana concerned the constitutionality of an Indiana statute providing for the commitment of a criminal defendant if the trial court found he was not competent to stand trial.[24] The statute obligated the court to delay a criminal trial until the defendant became competent to stand trial.[25] Indiana confined such defendants in mental hospitals until a court deemed them competent.[26] The statute did not provide a defendant the right to counsel at the competency hearing,[27] nor did it authorize either the trial court or mental health authorities to conduct periodic reviews of a defendant's competency.[28]

The State charged Jackson with two counts of robbery.[29] The trial court held a competency hearing, following which it found Jackson incompetent to stand trial[30] and ordered him committed pursuant to the statute.[31]

The Court ruled that Indiana's statute violated the Constitution.[32] The Court recognized that although states traditionally were allowed to exercise broad powers in commitment of mentally ill people,[33] Indiana had overstepped the substantive limitations of the Due Process Clause.[34] Without approving the permissible substantive bases for indefinite civil commitment, the Court listed some bases that other states' civil commitment laws had articulated.[35] These included "dangerousness to self, dangerousness to others, and the need for care or treatment or training."[36] Jackson's commitment proceedings did not probe into

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23. 406 U.S. 715 (1972).
24. *Id.* at 720.
25. *Id.*
26. *Id.*
27. *Id.* at 721.
28. *Id.* at 720.
29. *Id.* at 717.
30. *Id.* at 718–19. Jackson was a "mentally defective deaf mute with [the] mental level of a pre-school child." *Id.* at 717. Although Indiana's statute did not give a defendant the right to counsel at such a competency hearing, Jackson's lawyer was present. *Id.* at 718.
31. *Id.* at 719.
32. *Id.* at 731. The Court also held that Indiana's statute deprived Jackson of equal protection of the law because "the mere filing of criminal charges" was not sufficient to justify the statute's provision of less procedural and substantive protection than Indiana's general civil commitment law. *Id.* at 724.
33. *Id.* at 736.
34. *Id.* at 737–38.
35. *Id.* at 736–37.
36. *Id.* at 737.

"*any* of the articulated bases for exercise of Indiana's power of indefinite commitment."[37]

The Court held that, at a minimum, "due process requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed."[38] Using this standard, the Court struck down Indiana's statute because Jackson's indefinite confinement bore no "reasonable relation" to the purpose of his commitment—his incapacity to stand trial.[39] Thus, incapacity to stand trial is not, alone, a constitutionally sufficient ground for indefinite commitment.[40]

In examining Indiana's civil commitment law, the Court articulated a rational basis test ("reasonable relation"), which, at first glance, defers to the state. But the Court then appeared to probe Indiana's purpose for the law and require some kind of relation between the means used to effectuate the statute and its purpose.[41] Such a requirement supports the conclusion of some commentators that the Court uses heightened scrutiny in reviewing civil commitment statutes.[42] That view is slightly overstated based solely on *Jackson*, however, because the Court applied heightened scrutiny only to review whether "incapacity to stand trial" served as an acceptable basis for indefinite commitment.[43] *Jackson* did not, for example, address whether the elements of a constitutionally acceptable basis of commitment are subject to heightened scrutiny.

In summary, *Jackson* supports the principle that heightened scrutiny may be used to distinguish acceptable from unacceptable bases for involuntary commitment. However, the case does not stand for the proposition that the elements of an acceptable basis for commitment should receive heightened review. In other words, once the Court approves mental illness and dangerousness as sufficient grounds for indefinite commitment, *Jackson* does not support the use of heightened review to determine whether a statutory condition actually meets the definition of "mental illness."

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37. *Id.* at 737–38.

38. *Id.* at 738. This requirement does appear to constitute a heightened level of substantive due process review. The Court probed into Indiana's purpose for the civil commitment law and also required some kind of a relation between the means used and that purpose.

39. *Id.*

40. *Id.* The Court implied, however, that incapacity to stand trial plus dangerousness would be sufficient grounds for indefinite commitment. *See id.* at 731–33.

41. *See id.* at 738.

42. *See supra* notes 11–12 and accompanying text.

43. *Jackson*, 406 U.S. at 738.

B. Addington v. Texas[44]

The United States Supreme Court next decided *Addington v. Texas*. *Addington* concerned the burden of proof required for a state to civilly commit an individual to a mental hospital.[45]

In accordance with Texas law, Addington's mother filed a petition for his indefinite commitment to a state mental hospital.[46] Before Texas could civilly commit Addington, Texas law required proof that he was mentally ill and required hospitalization for his own welfare or for the protection of others.[47] The state held a jury trial to determine if Addington met these two statutory requirements.[48] The trial judge instructed the jury that the State had the burden of proving both statutory requirements by "clear, unequivocal and convincing evidence."[49] Based on these instructions, the jury found that Addington was mentally ill and required hospitalization for his own welfare or for the protection of others.[50] The trial court ordered the state to commit Addington to a mental hospital for an indefinite period.[51]

Addington appealed the trial court's order on the basis that any standard less than proof "beyond a reasonable doubt" violated both his procedural and substantive due process rights.[52] The Texas Supreme Court held that a "preponderance of the evidence standard" sufficed in a civil commitment proceeding, and upheld Addington's commitment.[53] The United States Supreme Court also rejected Addington's argument but, in contrast to the Texas Supreme Court, held that the Due Process Clause requires proof of the state's statutory civil commitment requirements by clear and convincing evidence.[54]

The Court explained that to determine what standard of proof should govern civil commitment proceedings it "must assess both the extent of [Addington's] interest in not being involuntarily confined indefinitely and the

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44. 441 U.S. 418 (1979).
45. *Id.* at 419–20.
46. *Id.* at 420.
47. *Id.*
48. *Id.* At the trial, the state offered evidence that Addington suffered from serious delusions as well as the testimony of two psychiatrists who stated that, in their opinion, he suffered from psychotic schizophrenia and was "probably dangerous both to himself and to others." *Id.* at 421. Addington admitted that he was mentally ill, but contended the state had not proven he was dangerous either to himself or to others. *Id.* The Court had previously ruled that "dangerousness" was a prerequisite for indefinite civil confinement. *See* O'Connor v. Donaldson, 422 U.S. 563, 575 (1975).
49. *Addington*, 441 U.S. at 421.
50. *Id.*
51. *Id.*
52. *Id.* at 421–22.
53. State v. Addington, 557 S.W.2d 511, 511 (Tex. 1977), *rev'd*, 441 U.S. 418 (1979).
54. *Addington*, 441 U.S. at 432–33.

state's interest in committing the emotionally disturbed under a particular standard of proof."[55] The Court recognized that Addington had a substantial interest in avoiding involuntary civil commitment, and that this interest "requires due process protection."[56] Meanwhile, the state possessed "legitimate" interests both in providing care to its citizens unable to care for themselves and in protecting its citizens from those with "dangerous tendencies" due to their mental illness.[57] The Court concluded, however, that "[u]nder the Texas Mental Health Code,...the State ha[d] no interest in confining individuals involuntarily if they [were] not mentally ill or if they d[id] not pose some danger to themselves or others."[58]

Use of a "preponderance of the evidence" standard increases the risk that the state will confine people that it has no interest in confining.[59] The Court found that the State had not demonstrated a sufficient interest in the use of a "preponderance of the evidence" standard to outweigh this risk.[60] The Court added that a "[l]oss of liberty calls for a showing that the individual suffers from something more serious than is demonstrated by idiosyncratic behavior."[61] An increased burden of proof helps prevent such a loss of liberty.[62] Therefore, the Court ruled that the Constitution required a greater standard of proof than mere "preponderance of the evidence" in involuntary civil commitment proceedings.[63]

The Court also found, however, that a requirement of proof "beyond a reasonable doubt" would "completely undercut [the state's] efforts to further the legitimate interests of both the state and the patient that are served by civil

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55. *Id.* at 425.

56. *Id.* at 425–26. The Court found two compelling reasons why an individual retains a constitutionally protected interest against involuntary civil commitment. First, "civil commitment for any purpose constitutes a significant deprivation of liberty." *Id.* at 425. Second, "involuntary commitment to a mental hospital...can engender adverse social consequences to the individual." *Id.* at 425–26.

57. *Id.* at 426. In other words, a state has an interest in committing individuals under both its parens patriae power and its police power. *See* Morris, *supra* note 4, at 604 (discussing the *Addington* Court's two bases for civil commitment); *supra* text accompanying notes 4–6.

58. *Addington*, 441 U.S. at 426. The Court only stated that *under Texas law* the state has no interest in confining individuals unless they are both mentally ill and pose some danger to themselves or others. Texas' civil commitment statute required both mental illness and dangerousness. However, in subsequent cases, the Court held that *Addington* stands for the rule that states in *all* civil commitment cases must prove both mental illness and dangerousness by clear and convincing evidence. *See, e.g.*, Foucha v. Louisiana, 504 U.S. 71, 75–76 (1992); Jones v. United States, 463 U.S. 354, 362 (1983).

59. *Addington*, 441 U.S. at 426.

60. *Id.* The Court again seemed to review a civil commitment law under heightened scrutiny, but this time the heightened review focused on the procedural safeguards provided, *i.e.*, the standard of proof. *See supra* notes 8–16 and accompanying text.

61. *Addington*, 441 U.S. at 427.

62. *Id.*

63. *Id.*

commitments."[64] In a civil commitment proceeding, Texas courts inquired as to whether the individual was mentally ill and whether the individual was dangerous.[65] This inquiry required psychiatric testimony, and "given the lack of certainty...of psychiatric diagnosis, there [was] a serious question as to whether a state could ever prove beyond a reasonable doubt that an individual [was] both mentally ill and likely to be dangerous."[66] Therefore, the Court concluded that the Constitution required only that the state prove the statutory requirements of civil commitment by clear and convincing evidence.[67]

Addington is important because it established the rule that a state can civilly commit mentally ill and dangerous individuals without offending the Constitution.[68] *Addington* also reinforced the principle of heightened review of *procedural* safeguards in civil commitment schemes.[69] The Court required Texas to show that its interests were furthered in forgoing a procedural safeguard that would decrease the risk of committing nonmentally ill people.[70]

C. Jones v. United States[71]

Jones v. United States concerned the commitment of a criminal defendant after the court found him not guilty by reason of insanity. The District of Columbia's statutory scheme afforded a criminal defendant the affirmative defense of insanity if the defendant established his insanity by a preponderance of the evidence.[72] However, if a defendant successfully invoked this defense, the statute authorized the government to automatically commit him to a mental health hospital.[73] If the government committed an insanity acquittee, the statute obligated the court to provide the detained individual with a judicial hearing within fifty

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64. *Id.* at 430.
65. *Id.* at 429.
66. *Id.*
67. *Id.* at 431–32. Although some states' civil commitment statutes require proof "beyond a reasonable doubt," this does not necessarily indicate that such a standard of proof is adequate for all states. The Court articulated:

> The essence of federalism is that states must be free to develop a variety of solutions to problems and not be forced into a common, uniform mold. As the substantive standards for civil commitment may vary from state to state, procedures must be allowed to vary so long as they meet the constitutional minimum.

Id. at 431. The Court appears to say that the substantive requirements of the Texas statute, mental illness and dangerousness, are not constitutionally required in civil commitment statutes. *But see supra* note 58.
68. *See* Foucha v. Louisiana, 504 U.S. 71, 75–76 (1992).
69. *See supra* note 60 and text accompanying notes 59–63.
70. *Addington*, 441 U.S. at 426.
71. 463 U.S. 354 (1983).
72. *Id.* at 356; *see also* D.C. CODE ANN. § 24–301(j) (1981).
73. *Jones*, 463 U.S. at 356; *see also* D.C. CODE ANN. § 24–301(d)(1) (1981).

days.[74] At this hearing, if the detained individual proved by a preponderance of the evidence that he no longer suffered from a mental illness or that he no longer was dangerous, the state was required to release him.[75] If the detained individual proved neither of the two, the statute granted him similar hearings every six months.[76]

The District of Columbia arrested Jones for his attempt to shoplift a jacket, and charged him with petit larceny, a crime punishable by a maximum prison sentence of one year.[77] Jones pled not guilty by reason of insanity and the Government did not contest his plea.[78] The trial court committed him to a mental health hospital pursuant to the District of Columbia statute.[79] At the fifty day hearing, Jones did not prove by a preponderance of the evidence either the absence of mental illness or the lack of dangerousness.[80] The government continued, therefore, to confine Jones until a second hearing, which took place more than one year after the District of Columbia had committed him.[81] Thus, the District of Columbia confined Jones in a mental hospital longer than the maximum one-year prison sentence it prescribed for the charged crime.[82] Jones demanded that the District of Columbia either release him or recommit him pursuant to the statute controlling the general civil commitment of citizens.[83] That statute required the government to prove both mental illness and dangerousness by clear and convincing evidence.[84] The trial court rejected Jones' demand and continued his confinement.[85] Jones appealed, and eventually the case reached the United States Supreme Court.[86]

Jones based his appeal on *Addington*, which held that the Due Process Clause required clear and convincing evidence that an individual was mentally ill and dangerous before the state could civilly commit him.[87] Jones argued that the District of Columbia did not meet this constitutional requirement because the

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74. *Jones*, 463 U.S. at 357; *see also* D.C. CODE ANN. § 24–301(d)(2) (1981).
75. *Jones*, 463 U.S. at 357; *see also* D.C. CODE ANN. § 24–301(d)(2) (1981).
76. *Jones*, 463 U.S. at 358; *see also* D.C. CODE ANN. § 24–301(k) (1981).
77. *Jones*, 463 U.S. at 359.
78. *Id.* at 360.
79. *Id.*
80. *Id.*
81. *Id.*
82. *Id.*
83. *Id.*
84. *Id.* In contrast, according to the District of Columbia's statute authorizing commitment of insanity acquittees, in order to gain release from his commitment, the individual had to prove by a preponderance of the evidence that he was either no longer mentally ill or no longer dangerous. *Id.* at 356–57; *see supra* text accompanying note 75.
85. *Jones*, 463 U.S. at 360–61.
86. *Id.* at 361.
87. *Id.* at 362. Note the *Jones* Court's extension of *Addington*. *Addington* held that Texas had to prove by clear and convincing evidence its statutory requirements for civil commitment; *Jones* transformed Texas' statutory requirements into general constitutional requirements for civil commitment. *See supra* note 58.

judgment of not guilty by reason of insanity did not constitute a finding of mental illness and dangerousness, and even if it did, it was only established by a preponderance of the evidence.[88] The Supreme Court rejected both of Jones' arguments.[89]

The Court found that the judgment of not guilty by reason of insanity established both Jones' mental illness and dangerousness and, thus, comported with *Addington*.[90] The insanity acquittal proved beyond a reasonable doubt that Jones committed a criminal act.[91] The government did not risk commitment of Jones for merely "idiosyncratic behavior"[92] because the criminal act was "concrete evidence...[of his] dangerousness."[93] The Court also concluded that the insanity acquittal established Jones' mental illness for the subsequent commitment: "It comports with common sense to conclude that someone whose mental illness was sufficient to lead him to commit a criminal act [was] likely to remain ill and in need of treatment."[94]

The Court next rejected Jones' argument that *Addington* required the District of Columbia to prove his mental illness and dangerousness by clear and convincing evidence.[95] The Court distinguished Jones' situation from *Addington* on two bases. First, *Addington* involved commitment of an individual in a purely civil context,[96] whereas a finding of not guilty by reason of insanity established Jones' criminal conduct.[97] This judgment eliminated any risk that the government committed Jones for "mere 'idiosyncratic' behavior," and, thus, a lower standard of proof sufficed.[98] Second, Jones advanced the insanity defense, and, hence, unlike *Addington*, no need existed to protect Jones from the stigma associated with civil

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88. *Jones*, 463 U.S. at 362.

89. *Id.* at 366–67.

90. *Id.* at 364–66.

91. *Id.* at 364. The Court stated that Jones' situation differed from *Jackson v. Indiana*, 406 U.S. 715 (1972), because in *Jackson* the State never proved that the accused committed any criminal acts before it committed him as incompetent to stand trial. *Jones*, 463 U.S. at 364 n.12; *see Jackson*, 406 U.S. at 724.

92. *See* Addington v. Texas, 441 U.S. 418, 427 (1979).

93. *Jones*, 463 U.S. at 364.

94. *Id.* at 366.

95. *Id.* at 366–68.

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

97. *Jones*, 463 U.S. at 367.

98. *Id.* The Court in *Addington* stated that an increased burden of proof lowered the risk that the state would commit an individual for "idiosyncratic behavior." *See supra* text accompanying notes 61–62. The Court appears to justify a lower standard of substantive due process review if the individual committed a prior criminal act. *See also infra* notes 126–28 and accompanying text (discussing O'Connor's concurrence in *Foucha v. Louisiana*, in which she promulgated a lower standard of review if the committed individual had committed a criminal act).

commitment.[99] A lower burden of proof sufficed because Jones stigmatized himself by his successful insanity defense.[100]

The *Jones* dissent argued that a constitutional analysis of commitment schemes required a balance of three factors: "the governmental interest in isolating and treating those who may be mentally ill and dangerous; the difficulty of proving or disproving mental illness and dangerousness in court; and the...intrusion on individual liberty that involuntary psychiatric hospitalization entails."[101] The majority stressed the first two factors and downplayed the third, however.[102] The majority, thus, retreated from the *Addington* requirements and showed deference to the District of Columbia's statutory scheme, advancing Jones' prior criminal conduct as the basis for this increased deference.

D. Foucha v. Louisiana[103]

In *Foucha*, the United States Supreme Court held unconstitutional a Louisiana statute that authorized commitment of insanity acquittees until they proved they were not dangerous, *regardless* of whether they remained mentally ill.[104]

Louisiana charged Foucha with aggravated burglary and illegal discharge of a firearm.[105] In 1984, Foucha was found not guilty by reason of insanity, and pursuant to Louisiana's statute was committed to a mental health facility.[106] Four years later, the state held a judicial hearing to determine if it had to release Foucha.[107] At this hearing, a doctor testified that Foucha's mental condition was stable, although he had an antisocial personality.[108] The doctor also stated that he

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99. *Jones*, 463 U.S. at 367 n.16.

100. *Id.*

101. *Id.* at 372 (Brennan, J., dissenting); *see also Addington*, 441 U.S. at 425 (stating that the constitutionality of Texas' civil commitment statute depended upon the balancing of the individual's liberty interest against the state's interest in committing the emotionally disturbed under a given standard of proof).

102. *Jones*, 463 U.S. at 370. "[W]hen Congress undertakes to act in areas fraught with medical and scientific uncertainties, legislative options must be especially broad and courts should be cautious not to rewrite legislation." *Id.* (quoting Marshall v. United States, 414 U.S. 417, 427 (1974)).

103. 504 U.S. 71 (1992).

104. *Id.* at 73, 83. Compare Louisiana's law to the District of Columbia's statute in *Jones*, which authorized commitment of insanity acquittees until they proved either they were no longer dangerous or no longer mentally ill. *See supra* text accompanying note 75.

105. *Foucha*, 504 U.S. at 73.

106. *Id.* at 74.

107. *Id.* at 74–75.

108. *Id.* at 75. The doctor stated that an antisocial personality did not constitute a mental disease and was untreatable. *Id.* The plurality did not probe into this finding because Louisiana did not contend that Foucha was mentally ill. *See id.* at 77; *see also* Alexander D. Brooks, *The Constitutionality and Morality of Civilly Committing Violent Sexual Predators*, 15 U. PUGET SOUND L. REV. 709, 721–22 (1992) (explaining that the plurality merely

would not "feel comfortable in certifying that [Foucha] would not be a danger to himself or to other people."[109] The trial court held that Foucha had not carried the burden of proving that he was not dangerous and, therefore, ordered his return to the mental health facility.[110] The Louisiana Supreme Court affirmed this holding, and Foucha appealed the decision to the United States Supreme Court.[111]

A four justice plurality, joined by Justice O'Connor's concurrence, reversed the Louisiana Supreme Court's decision and held that Louisiana's statute violated the Due Process Clause.[112] The plurality based its decision on Louisiana's lack of a mental illness requirement for Foucha's continued confinement.[113] It relied on *Jones*, which held that an insanity acquittee was "entitled to release when he...recovered his sanity or [was] no longer dangerous."[114]

The plurality stated that under the Due Process Clause a state can confine an individual in only three situations. First, a state can incarcerate convicted criminals for the purposes of deterrence and retribution.[115] Louisiana could not confine Foucha on this basis, though, because the state never convicted him of a crime. Second, a state, "in certain narrow circumstances," can impose "limited confinement" on an individual who poses a danger to the community.[116] The plurality, however, stated that Louisiana's commitment statute was not "narrowly focused" and, thus, could not fit into this category of constitutional confinement.[117]

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accepted Louisiana's categorization of antisocial personality disorder as a "nonmental illness").

109. *Foucha*, 504 U.S. at 75.

110. *Id.* Whether Foucha remained mentally ill was irrelevant under Louisiana's law. *See supra* note 104 and accompanying text.

111. *Foucha*, 504 U.S. at 75.

112. *Id.* at 83.

113. *Id.* at 77–78, 88.

114. Jones v. United States, 463 U.S. 354, 368 (1983); *see also* Addington v. Texas, 441 U.S. 418 (1979) (stating that civil commitment required proof of both mental illness and dangerousness); O'Connor v. Donaldson, 422 U.S. 563 (1975).

115. *Foucha*, 504 U.S. at 80 (holding that a mentally ill individual who was not dangerous could not be civilly confined).

116. *Id.* The plurality relied on *United States v. Salerno*, 481 U.S. 739 (1987), for this second permissible situation. *Foucha*, 504 U.S. at 80–81. The Court in *Salerno* held constitutional the pretrial detention of a criminal defendant based solely on his future dangerousness, because the government sufficiently limited the circumstances that permitted detention and because the "stringent time limitations of the Speedy Trial Act" limited the duration of the confinement. *Salerno*, 481 U.S. at 747. This Note does not discuss *Salerno* because that case does not regard the civil confinement of mentally ill and dangerous people. Rather, *Salerno* established a whole new category of confinement based solely on dangerousness. Confinement on this basis is subject to strict scrutiny review because courts need not give any deference to a legislative definition of "mental illness." *See id.* at 749–50.

117. *Foucha*, 504 U.S. at 83. While not explicitly stating such, the plurality appeared to require strict scrutiny review for this category of confinement. *See id.* at 81 (stating that confinement should occur in only "carefully limited" circumstances and for only a "strictly limited" duration).

Third, a state could "confine a mentally ill person if it [showed] by clear and convincing evidence that the individual [was] mentally ill and dangerous."[118] The plurality opinion did not clearly enunciate what a state would have to prove to fulfill the "mental illness" requirement, but it held that Louisiana's law fell short.

The plurality used broad language that appeared to place specific limitations on whom a state could confine as "mentally ill":

> [Louisiana] asserts that because Foucha once committed a criminal act and now has an antisocial personality that sometimes leads to aggressive conduct, a disorder for which there is no effective treatment, he may be held indefinitely. This rationale would permit the State to hold indefinitely any other insanity acquittee not mentally ill who could be shown to have a personality disorder that may lead to criminal conduct. The same would be true of a convicted criminal, even though he has completed his prison term.[119]

The plurality, therefore, implied that an "antisocial personality" could not constitute confinable "mental illness" as required by *Addington*.[120] The factual circumstances of *Foucha*, however, limited the plurality's holding. Louisiana's law permitted continued confinement of insanity acquittees regardless of any "mental illness," and, hence, did not even require an antisocial personality.[121] In fact, Louisiana did not even claim that Foucha was mentally ill.[122] Perhaps the most important thing to remember is that this was just a plurality opinion. Justice O'Connor's concurrence provided the decisive fifth vote.

Justice O'Connor's concurrence was more deferential to state legislation than was the plurality.[123] She made two very important points. First, she equated the constitutional standard for "mental illness" with a "medical justification" for confinement.[124] Here, Louisiana fell short because its statute permitted confinement of completely sane insanity acquittees.[125] Justice O'Connor did not agree with the

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118. *Id.* at 80 (quoting *Jones*, 463 U.S. at 362).

119. *Foucha*, 504 U.S. at 82–83. The Kansas Supreme Court, in *In re Hendricks*, 912 P.2d 129 (Kan. 1996), *rev'd sub nom.* Kansas v. Hendricks, 117 S. Ct. 2072 (1997), based its decision, in large part, on this broad language. *See infra* notes 149–51 and accompanying text.

120. *See supra* notes 57–58 and accompanying text (discussing the constitutionality of confining "mentally ill" and "dangerous" individuals).

121. *See supra* note 104 and accompanying text.

122. *Foucha*, 504 U.S. at 80.

123. *See id.* at 87 (O'Connor, J., concurring) (stating that courts should defer to "reasonable legislative judgments" regarding "mental illness" and dangerousness).

124. *See id.* at 88 (O'Connor, J., concurring) ("[Insanity] acquittees could not be confined as mental patients absent some medical justification for doing so....").

125. *See id.* at 86–87 (O'Connor, J., concurring) ("I write separately...to emphasize that the Court's opinion addresses only the specific statutory scheme before us, which broadly permits indefinite confinement of sane insanity acquittees in psychiatric

plurality that, as a matter of constitutional law, an antisocial personality disorder cannot constitute "mental illness." Second, she stated that the finding of criminal conduct by insanity acquittees sets them apart from other citizens and is strong evidence of their dangerousness.[126]

Justice O'Connor appeared to support a less strict standard of review for civil commitment of those convicted of criminal acts.[127] She did not clearly articulate, however, whether this deference would apply only to commitment of insanity acquittees, or whether it would also hold true for civil commitment of individuals who had completed a penal sentence for past criminal conduct.[128]

Foucha is helpful because the Court made clear that confinement for mere dangerousness is subject to strict scrutiny review and is not permissible unless the duration of the confinement is strictly limited.[129] *Foucha* caused confusion, however, with regard to the "mentally ill" component of civil commitment schemes.[130] Were lower courts to rely on the plurality's broad language that antisocial personality was an insufficient basis for commitment as a matter of constitutional law; or were they to understand that this statement was limited to situations where there was no statutory requirement of mental illness of any kind? Perhaps the key to the substantive requirements of "mental illness" after *Foucha* was Justice O'Connor's "medical justification" standard.

E. Summary of the Law as It Stood Prior to Hendricks

The Court hinted at heightened scrutiny both for constitutional review of procedural safeguards[131] and for determining whether a substantive condition—such as incapacity to stand trial or mental illness—is a constitutionally sufficient

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facilities."). Justice O'Connor's standard of "some medical justification" undercuts the plurality's broad language.

126. *See id.* at 87 (O'Connor, J., concurring).

127. *See also* Jones v. United States, 463 U.S. 354, 364 (1983). *But see* Jackson v. Indiana, 406 U.S. 715, 724 (1972); *supra* note 32. Justice O'Connor appeared to place even greater emphasis on the presence of prior criminal conduct than did the *Jones* Court. She not only stated that prior criminal conduct is evidence of dangerousness but that it also "sets them apart from ordinary citizens." *Foucha*, 504 U.S. at 87 (O'Connor, J., concurring). This statement could mean use of a less strict standard of constitutional review of commitment statutes for those with prior criminal convictions.

128. Justice O'Connor only explains that this lower standard of review may not be applicable for all crimes. *See Foucha*, 504 U.S. at 88 (O'Connor, J., concurring) (stating that nonviolent and minor crimes may not suffice to lower the standard of review).

129. *See id.* at 81–83.

130. *Compare* La Fond, *supra* note 17, at 693 ("The majority opinion [in *Foucha*] concluded...that a citizen could not be considered 'mentally ill' because he suffered from an antisocial personality or personality disorder that purportedly made him dangerous to himself or others."), *with* Morris, *supra* note 4, at 629 (limiting *Foucha* to the statute confronted, which did not require any mental illness or personality disorder, but rather permitted civil confinement solely on the basis of dangerousness).

131. Addington v. Texas, 441, U.S. 418, 426–27 (1979); *see supra* notes 59–63 and accompanying text.

basis for indefinite commitment.[132] However, the Court also suggested that a criminal conviction might reduce these levels of review.[133]

Importantly, the Court ruled that mental illness plus dangerousness is a constitutionally sufficient substantive basis for indefinite commitment.[134] Two questions remaining after *Foucha* were (1) what constituted "mental illness" and (2) what standard of review would the Court apply in determining whether the elements of a particular law adequately defined "mental illness."[135]

III. KANSAS' SEXUALLY VIOLENT PREDATOR ACT[136]

In 1994, the Kansas Legislature passed the Sexually Violent Predator Act, which grants the state power to civilly commit a new category of individuals: "sexually violent predators."[137] The Act includes a preamble that states its purposes.[138] The Act also defines the relevant terms,[139] sets forth the procedures used to commit a predator,[140] describes the procedures used to release a previously committed individual,[141] and furnishes sexual offenders with procedural safeguards.[142]

A. The Preamble: Why Kansas Passed the Act

The preamble states both the Kansas Legislature's rationale for passing the Act and the Act's purposes:

> 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 defined in K.S.A. 59–2901 et seq...., which is intended to provide short-term treatment to individuals with serious mental disorders and then return them to the community.[143] In contrast to persons

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132. *Jackson*, 406 U.S. at 738.

133. *Foucha*, 504 U.S. at 87–88 (O'Connor, J., concurring); Jones v. United States, 463 U.S. 354, 364 (1983).

134. *Addington*, 441 U.S. at 426; *see supra* note 58.

135. *See supra* note 130 and accompanying text.

136. KAN. STAT. ANN. §§ 59–29a01 to 59–29a17 (1994 & Supp. 1996). The changes made in the Act between 1994 and 1996 were generally procedural and do not affect this Note's analysis or the outcome in *Hendricks*.

137. *Id.* § 59–29a07 (Supp. 1996).

138. *Id.* § 59–29a01 (1994).

139. *Id.* § 59–29a02 (Supp. 1996).

140. *Id.* §§ 59–29a03 to 59–29a07 (Supp. 1996).

141. *Id.* §§ 59–29a08 (Supp. 1996), 59–29a10 (Supp. 1996), 59–29a11 (1994).

142. *Id.* §§ 59–29a05 to 59–29a07 (Supp. 1996).

143. Kansas Statutes Annotated section 59–2901 authorizes the commitment of any person who is "mentally ill." *Id.* § 59–2917(f) (1994). A "mentally ill person" is any individual who: "(1) Is suffering from a severe mental disorder to the extent that such

> appropriate for civil commitment under K.S.A. 59–2901 et seq...., sexually violent predators generally have antisocial personality features which are unamenable to existing mental illness treatment modalities and those features render them likely to engage in sexually violent behavior.... The existing involuntary commitment procedure pursuant to the treatment act for mentally ill persons...is inadequate to address the risk these sexually violent predators pose to society.[144]

The Kansas Supreme Court found the preamble instrumental when it declared the Act unconstitutional.[145] Kansas used the Act to commit Leroy Hendricks, who was scheduled for penal release after a ten-year sentence for taking "indecent liberties" with two young boys.[146] At Hendricks jury trial, a psychiatrist testified that Hendricks suffered from pedophilia, and that this condition qualified as a "mental abnormality" under the Act.[147] The jury found beyond a reasonable doubt that Hendricks was a "sexually violent predator," and, on that basis, the trial judge ordered Hendricks' commitment.[148] Relying on the broad language of the plurality in *Foucha*, the Kansas Supreme Court ruled that the Act violated Hendrick's substantive due process rights based on the legislature's blatant admission that only a finding of "antisocial personality features," not "mental illness," was required for the state to civilly commit Hendricks.[149] The interpretation the Kansas Supreme Court gave to *Foucha* was that an antisocial personality does not constitute "mental illness," and thus a state cannot civilly commit an individual on this basis.[150] According to the Kansas Supreme Court, *Foucha* stood for the rule that courts were to review the substantive components of civil commitment laws with some heightened vigor rather than merely to defer to reasonable legislative judgments.[151]

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person is in need of treatment; (2) lacks capacity to make an informed decision concerning treatment; and (3) is likely to cause harm to self or others." *Id.* § 59–2902(h) (1994).

144. *Id.* § 59–29a01 (1994).

145. *In re* Hendricks, 912 P.2d 129, 136–37 (Kan. 1996), *rev'd sub nom.* Kansas v. Hendricks, 117 S. Ct. 2072 (1997). Washington's Sexually Violent Predator Act contains a preamble almost identical to the Kansas Act's preamble. *Id.* at 132; *see* WASH. REV. CODE § 71.09.010 (1992). Commentators have also criticized Washington's preamble. *See, e.g.*, Beth Keiko Fujimoto, Comment, *Sexual Violence, Sanity, and Safety: Constitutional Parameters for Involuntary Civil Commitment of Sex Offenders*, 15 U. PUGET SOUND L. REV. 879, 906–07 & n.154 (1992) (stating that Washington's preamble admits that "persons subject to commitment under the Act do *not* suffer from a mental disease or defect").

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

147. *Id.* at 131.

148. *Id.*

149. *Id.* at 137–38.

150. *Id.* at 138; *see supra* text accompanying notes 119–22 (discussing the broad language in *Foucha* that led to the Kansas court's decision).

151. Other courts and commentators have agreed with the Kansas Supreme Court's interpretation of *Foucha*. *See, e.g.*, Young v. Weston, 898 F. Supp. 744, 749–51 (D. Wash. 1995); La Fond, *supra* note 17, at 693 ("The majority opinion [in *Foucha*]

B. Terms Defined: The Substantive Component of the Act

Kansas' Act contains many terms of art that necessitate definition. These definitions constitute the substantive component of the Act. In other words, how one interprets these definitions determines who is committed as a sexually violent predator. According to the Act, a "sexually violent predator" is

> any person who has been convicted of or charged with a sexually violent offense and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in the predatory acts of sexual violence, if not confined in a secure facility.[152]

"Mental abnormality" is defined as

> a congenital or acquired condition affecting the emotional or volitional capacity which predisposes the person to commit sexually violent offenses in a degree constituting such person a menace to the health and safety of others.[153]

The Act does not define "personality disorder."[154] It is, however, a mental condition expressly recognized by the American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders* ("*DSM–IV*").[155] This recognition means the term is anchored in diagnoses actually used by mental health

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concluded...that a citizen could not be 'mentally ill' because he suffered from an antisocial personality or personality disorder that purportedly made him dangerous to himself or others."). Other courts and commentators, however, read *Foucha* more narrowly and determined that the Supreme Court's standard was still one of deference to legislation. *See, e.g.*, *In re Hendricks*, 912 P.2d at 147–48 (Larson, J., dissenting) (limiting *Foucha* to the statute at issue, which required no mental problems but only dangerousness); State v. Post, 541 N.W.2d 115, 123 (Wis. 1995) ("[T]he Supreme Court has declined to enunciate a single definition that must be used as the mental condition sufficient for involuntary mental commitments."); Brooks, *supra* note 108, at 721–22 (stating that the Louisiana statute in *Foucha* did not require any form of mental illness, and the Court merely accepted Louisiana's categorization of antisocial personality disorder as a nonmental illness); Morris, *supra* note 4, at 629 (limiting *Foucha* to the Louisiana statute confronted).

152. KAN. STAT. ANN. § 59–29a02(a) (Supp. 1996).

153. *Id.* § 59–29a02(b) (Supp. 1996). The Kansas Supreme Court criticized this definition, stating that it is circular "in that certain behavior defines the condition which is used to predict the behavior." *In re Hendricks*, 912 P.2d at 138.

154. *In re Hendricks*, 912 P.2d at 137.

155. AMERICAN PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (4th ed. 1994) [hereinafter DSM–IV]. The *DSM–IV* lists as the general diagnostic criteria for a personality disorder: (1) "an enduring pattern of inner experience and behavior that deviates markedly from the expectations of the individual's culture," (2) the "enduring pattern is inflexible and pervasive," (3) the "enduring pattern leads to clinically significant distress or impairment in...important areas of functioning," (4) the "pattern is stable and of long duration," (5) the "enduring pattern is not better accounted for as a manifestation or consequence of another mental disorder," and (6) the "enduring pattern is not due to the direct physiological effects of a substance." *Id.* at 633.

professionals,[156] which, some commentators believe, makes the term more reliable and less apt to be used to commit "nonmentally ill" people.[157]

In contrast, the *DSM–IV* does not define a "mental abnormality."[158] This lack of a medically sanctioned definition led many to believe that the term was constitutionally insufficient for civilly committable mental illness.[159]

Another problem with the term "mental abnormality" is its potential circularity since the condition can "be established...only by virtue of the sexual offending behavior itself.... [T]he abnormality is derived from the sexual behavior which in turn is used to establish the predisposition to other sexual behavior."[160] This circularity could detach "mental abnormality" from any medically supportable idea of "mental illness," placing the entire justification for commitment on the prior sexual misconduct.[161] The Kansas Supreme Court recognized this definitional breakdown,[162] as have several commentators.[163]

C. Commitment Procedure and Safeguards Provided

The civil commitment of an individual pursuant to the Act begins while the individual is incarcerated. Prison authorities must give notice to the state attorney general of the anticipated release of a sexual offender ninety days before the date of the anticipated release.[164] If the state attorney general determines that the confined individual meets the definition of a "sexually violent predator," she can file a petition with the trial court alleging facts sufficient to support such an allegation.[165] The trial judge determines if probable cause exists that the individual

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156. *See* John Q. La Fond, *Washington's Sexually Violent Predators Statute: Law or Lottery? A Response to Professor Brooks*, 15 U. PUGET SOUND L. REV. 755, 763 (1992).

157. *See, e.g., id.*

158. *In re Hendricks*, 912 P.2d at 137–38.

159. *See, e.g.*, Young v. Weston, 898 F. Supp. 744, 750 & n.2 (W.D. Wash. 1995); Brooks, *supra* note 108, at 730.

160. Robert M. Wettstein, M.D., *A Psychiatric Perspective on Washington's Sexually Violent Predators Statute*, 15 U. PUGET SOUND L. REV. 597, 602 (1992).

161. *See* La Fond, *supra* note 17, at 698–99.

162. *See In re Hendricks*, 912 P.2d at 138.

163. *See, e.g.*, La Fond, *supra* note 156, at 764 ("This definitional strategy is a pure tautology, conflating both diagnosis and prediction with a single incident of criminal behavior. It is circular reasoning at its worst!"); James D. Reardon, M.D., *Sexual Predators: Mental Illness or Abnormality? A Psychiatrist's Perspective*, 15 U. PUGET SOUND L. REV. 849, 852 (1992) (Reardon believed the "logic" of the law was that "[i]f you commit more than one sex offense, the likelihood of doing it again goes up; therefore, you *must* have a mental abnormality or personality disorder that makes you likely to commit these monstrous crimes."). *But see* Cornwell, *supra* note 12, at 1319–20 (finding that not "all individuals who engage in an act of sexual violence will be deemed mentally abnormal by virtue of that act").

164. KAN. STAT. ANN. § 59–29a03(a) (Supp. 1996).

165. *Id.* § 59–29a04 (Supp. 1996).

named in the petition meets the definition of a "sexually violent predator."[166] If so, the state takes the individual into custody.[167] Within seventy-two hours, the detainee is entitled to a hearing to contest the finding of probable cause.[168] At such a hearing, the person possesses the right to counsel, the right to present evidence on his own behalf, the right to cross-examine the state's witnesses, and the right to view and copy all petitions and reports in the court file.[169] If the judge upholds the determination of probable cause, the state is directed to transfer the individual to an appropriate, secure facility where a qualified professional will perform a psychiatric evaluation.[170]

"Within 60 days of [the above hearing]...the court...conduct[s] a trial to determine whether the person is a sexually violent predator."[171] The court must furnish the individual with specific rights at the trial, including the right to counsel[172] and the right to a jury trial.[173] Finally, the trier of fact must determine "beyond a reasonable doubt" that the person is a "sexually violent predator."[174] If the fact finder determines that the person is a "sexually violent predator," the court must order the state to commit the individual to the custody and care of the Secretary of the Department of Social and Rehabilitation Services (the "Secretary").[175]

D. Release Procedure and Safeguards Provided

The Act provides a committed sexual predator further protection by specifying the procedure the state must follow in evaluating his condition and releasing him. The Act authorizes three methods of release. First, it requires an annual examination of a committed person's mental condition and an annual court review of his status as a "sexually violent predator."[176] If, during an annual review, the court determines probable cause exists that the committed person's "mental abnormality" or "personality disorder" has changed such that the State can safely release the person, the court schedules a hearing where the State must prove beyond a reasonable doubt that the person still meets the statutory definition of a "sexually violent predator."[177] If the State cannot meet this burden of proof, it must release the person.[178]

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166. *Id.* § 59–29a05(a) (Supp. 1996).
167. *Id.*
168. *Id.* § 59–29a05(b) (Supp. 1996).
169. *Id.* § 59–29a05(c) (Supp. 1996).
170. *Id.* § 59–29a05(d) (Supp. 1996).
171. *Id.* § 59–29a06 (Supp. 1996).
172. *Id.*
173. *Id.*
174. *Id.* § 59–29a07 (Supp. 1996).
175. *Id.*
176. *Id.* § 59–29a08 (Supp. 1996).
177. *Id.*
178. *Id.*

Second, if the Secretary determines that the person no longer fits the definition of a "sexually violent predator" because of a change in the committed person's mental condition, she must authorize the confined person to petition the court for a hearing.[179] At this hearing, the State must prove beyond a reasonable doubt that the individual remains a "sexually violent predator" in order to retain custody of the person.[180]

Third, a committed person may initiate release procedures by filing a petition for discharge at any time.[181] The Act, however, places limits on the petitions a court will hear. If the Secretary does not approve a petition, the court must deny it, unless it contains facts from which the court could infer such a significant change in the petitioner's mental condition that a hearing is warranted.[182]

E. Summary of Kansas' Sexually Violent Predator Act

Based on a broad reading of *Foucha* and a use of heightened constitutional review, the Kansas Supreme Court determined that the Act could not stand because its substantive requirements for commitment did not constitute "mental illness."[183] The Kansas court, however, questioned neither the sufficiency of the Act's procedural safeguards nor the sufficiency of mental illness and dangerousness as a ground for indefinite civil commitment. The issues for the United States Supreme Court were clear: (1) what constitutes "mental illness" and (2) what standard of review should be applied to determine whether a law's substantive components meet this definition of "mental illness."

IV. *KANSAS V. HENDRICKS*[184]

The Court issued its latest civil commitment ruling in June 1997, with *Kansas v. Hendricks*. Many had hoped that the *Hendricks* Court would clear up the "mental illness" controversy left by *Foucha*.[185] Although the Court eradicated *Foucha*'s broad language concerning "mental illness," it once again failed to provide a clear standard for that term.[186]

The Supreme Court heard the case on appeal from the Kansas Supreme Court,[187] which had held Kansas' Act unconstitutional as a violation of substantive

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179. *Id.* § 59–29a10 (Supp. 1996).
180. *Id.*
181. *Id.* § 59–29a11 (1994).
182. *Id.* The Kansas Supreme Court found the limits so restrictive that it stated release under this third method was "improbable." *In re* Hendricks, 912 P.2d 129, 133 (Kan. 1996), *rev'd sub nom.* Kansas v. Hendricks, 117 S. Ct. 2072 (1997).
183. *In re Hendricks*, 912 P.2d at 137–38.
184. 117 S. Ct. 2072 (1997).
185. *See, e.g.*, Morris, *supra* note 4, at 639.
186. *See Hendricks*, 117 S. Ct. at 2081.
187. *Id.* at 2076.

due process under the Fourteenth Amendment.[188] The Supreme Court reversed the Kansas court's decision.[189]

The majority quickly explained that while "freedom from physical restraint" is at the core of the "liberty protected by the Due Process Clause," this interest is "not absolute."[190] The majority cited *Jacobsen v. Massachusetts*,[191] a case allowing mandatory vaccinations of adults if necessary for the public health and safety. The Court refrained from explicitly stating the standard of review, explaining only that states can forcibly commit individuals "who are unable to control their behavior and who thereby pose a danger to the public health and safety...provided the confinement takes place pursuant to proper procedures and evidentiary standards."[192]

The majority found that the Act clearly required dangerousness as a prerequisite for commitment.[193] It required an individual to be convicted of or charged with a sexually violent offense and also required a "mental abnormality" or "personality disorder" that made the person likely to commit sexually violent acts.[194] The majority, however, recognized that dangerousness, alone, is generally an insufficient basis for a state to indefinitely commit an individual.[195]

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188. *In re Hendricks*, 912 P.2d at 138. The Court also heard Hendricks' cross-petition on federal double jeopardy and ex post facto grounds. The Kansas Supreme Court never reached these claims. *See id.*

189. In fact, the Court was in unanimous agreement that the Act's definition of "mental abnormality" complied with substantive due process. *See Hendricks*, 177 S. Ct. at 2087–88 (Breyer, J., dissenting). Justice Ginsburg abstained from this issue. *See id.* at 2087 (Breyer, J., dissenting).

The Court also held the Act did not place Hendricks in double jeopardy nor violate the prohibition against ex post facto laws because it authorized civil, not criminal, confinement. *Id.* at 2086. Four justices dissented from this decision, however. *See id.* at 2088 (Breyer, J., dissenting) (joining Justice Breyer in dissent were Justices Stevens, Souter, and Ginsburg).

190. *Id.* at 2079.

191. 197 U.S. 11 (1905). The *Jacobsen* Court confronted the constitutional limits on a state's police power. *See id.* at 24–25. By relying on *Jacobsen*, the *Hendricks* majority made clear that commitment under Kansas' Act was pursuant to the state's police power and not its parens patriae power. *See also* 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; the state also has authority under its police power to protect the community from the dangerous tendencies of some who are mentally ill."); *see also* Morris, *supra* note 4, at 604 (discussing *Addington).*

192. *Hendricks*, 117 S. Ct. at 2079–80.

193. *See id.* at 2080 ("The statute thus requires proof of more than a mere predisposition to violence; rather, it requires evidence of past sexually violent behavior and a present mental condition that creates a likelihood of such conduct in the future....").

194. *See id.* The majority found that past acts of violence are evidence of future dangerousness. *See id.*; *see also supra* notes 90–93, 126–28 and accompanying text (discussing effect of a conviction on civil commitment review).

195. *Hendricks*, 117 S. Ct. at 2080. *But see* United States v. Solerno, 481 U.S.

The majority stated that the Court, in the past, had upheld civil commitment statutes that "coupled proof of dangerousness with the proof of some additional factor, such as 'mental illness' or 'mental abnormality.'"[196] This additional factor "limit[s] involuntary civil confinement to those who suffer from *a volitional impairment rendering them dangerous beyond their control.*"[197] Kansas' Act contains this additional factor because it requires a finding of "a 'mental abnormality' or 'personality disorder' that makes it difficult, if not impossible, for the person to control his dangerous behavior."[198] The majority, thus, found that an individual's inability to control dangerous behavior was sufficient to satisfy the "mental illness" requirement enunciated in *Addington*.[199]

The majority quickly dismissed Hendricks' argument that *Addington* and *Foucha* gave "talismanic significance" to the term "mental illness."[200] Rather, the term "mental abnormality" was permissible because the Court has "traditionally left to legislators the task of defining terms of a medical nature that have legal significance."[201] It is not important that a legislature's terms and definitions "do not fit precisely with...[those] employed by the medical community."[202] With these statements, the majority certainly drew back from any broad reading that courts and commentators had imputed to *Foucha*.[203]

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739 (1987); *supra* note 116.

196. *Id.* (citing three cases: (1) *Heller v. Doe*, 509 U.S. 312 (1993), allowing commitment of "mentally retarded" or "mentally ill" and dangerous individual; (2) *Allen v. Illinois*, 478 U.S. 364 (1986), allowing commitment of "mentally ill" and dangerous; (3) *Minnesota ex rel. Pearson v. Probate Court of Ramsey County*, 309 U.S. 270 (1940), allowing commitment of individuals with "psychopathic personalities" who are dangerous).

197. *Hendricks*, 117 S. Ct. at 2080 (emphasis added).

198. *Id.* Actually the Act states only that a "mental abnormality" affects an individual's "volitional capacity which *predisposes* the person to commit sexually violent offenses in a degree constituting such person a menace to the health and safety of others." KAN. STAT. ANN. § 59–29a02(b) (Supp. 1996) (emphasis added).

199. The Court's standard of inability to control dangerous behavior could fall into the same circularity trap as "mental abnormality." If a state can prove inability to control behavior by evidence of past criminal conduct, then the "mental illness" component of civil commitment collapses into the prior criminal conduct, and no real "mental illness" requirement exists. *See supra* notes 160–63 and accompanying text. The Court ignored this potential problem, however, deferring to state legislation.

200. *Hendricks*, 117 S. Ct. at 2080.

201. *Id.* at 2081 (citing Jones v. United States, 463 U.S. 354, 365 n.13 (1983)); *see also supra* note 102 (discussing deference given to legislation in this area).

202. *Hendricks*, 117 S. Ct. at 2081. However, the majority appeared to place some significance on the fact that Hendricks suffered from pedophilia, which the psychiatric profession "classifies as a serious mental disorder." *See id.* (citing the *DSM–IV*). The majority's holding, in fact, could potentially be limited to such defined disorders. *See id.* ("Hendricks' diagnosis as a pedophile, which qualifies as a 'mental abnormality' under the Act, thus plainly suffices for due process purposes."). In the end, though, the majority appeared to rely most heavily on Hendricks' admitted lack of volitional control over his dangerous behavior. *See id.* (stating that he cannot control the urge to molest children).

203. *See, e.g.*, La Fond, *supra* note 17, at 693 (giving broad reading to *Foucha*).

Justice Kennedy concurred in the opinion, but wrote separately to caution against the "dangers inherent when a civil confinement law is used in conjunction with the criminal process."[204] He stated that if "mental abnormality" turns out to be "too imprecise a category" for civil commitment, then it would not be constitutionally valid.[205]

The dissent agreed that "mental abnormality" suffices under the substantive component of the Due Process Clause, but for different reasons than the majority.[206] The dissent found Kansas' Act constitutional for three reasons. First, psychiatrists classify pedophilia, which Hendricks suffered from, as a "serious mental disorder."[207] Second, "Hendricks' abnormality [did] not consist simply of a long course of antisocial behavior, but rather it include[d] a specific, serious, and highly unusual inability to control his actions."[208] Third, Hendricks' mental abnormality caused a "serious danger" to society.[209] The dissent limited the breadth of its substantive due process holding to the unusual circumstances of this case.[210]

V. THE "MENTAL ILLNESS" STANDARD AFTER *HENDRICKS*

The *Hendricks* Court made one thing clear: civil commitment statutes for sexually violent predators are permissible under the federal Constitution.[211] But what does *Hendricks* mean for civil commitment statutes in general? The Court

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

205. *Id.* (Kennedy, J., concurring).

206. *Id.* at 2087–88 (Breyer, J., dissenting).

207. *Id.* at 2088 (Breyer, J., dissenting) (recognizing that though psychiatrists debate this fact, states can reasonably choose one side over the other).

208. *Id.* at 2088–89 (Breyer, J., dissenting) (recognizing that the idea of an "irresistible impulse" has helped shape the legal insanity defense in criminal law). This requirement seems much more in line with the *Foucha* plurality.

209. *Id.* at 2089 (Breyer, J., dissenting). Perhaps limiting deferential review to those who have committed serious, violent crimes. *See supra* note 128 and accompanying text.

210. The dissent also left open the possibility that Hendricks had a substantive due process right to treatment, but then confronted this potential right in the context of its double jeopardy and ex post facto discussion. *See Hendricks*, 117 S. Ct. at 2090 (Breyer, J., dissenting). The majority opinion provided a logical rationale, however, for why treatment should not be a substantive due process requirement for commitment based upon police power. *See id.* at 2084 ("[I]t would be of little value to require treatment as a precondition for civil confinement of the dangerously insane when no acceptable treatment existed. To conclude otherwise would obligate a State to release certain confined individuals who were both mentally ill and dangerous simply because they could not be successfully treated for their afflictions.").

211. *See, e.g.*, ARIZ. REV. STAT. ANN. §§ 13–4601 to 13–4613 (West Supp. 1996); WASH. REV. CODE §§ 71.09.010 to 71.09.230 (1992 & West Supp. 1997). Individuals could still challenge these laws under state constitutions.

clearly allows civil confinement of mentally ill and dangerous individuals,[212] but after *Hendricks*, controversy still surrounds the "mental illness" component of this standard.[213] Several questions remain: First, what is the substantive due process standard of review for civil commitment statutes confining mentally ill and dangerous people? Second, what definitions of "mental illness" meet that standard? Third, after *Hendricks* can any criminal with an antisocial personality disorder be civilly committed indefinitely by a state?

A. What Is the Substantive Due Process Standard of Review?

Many commentators mention what they believe to be the appropriate standard of review for civil commitment cases, but then they quickly move on.[214] The appropriate standard of review, however, is not a mere subsidiary issue, but often is the determining factor in whether a law is constitutional.[215] The standard of review for civil commitment statutes is difficult to arrive at because such cases involve a fundamental liberty right,[216] but at the same time involve an area traditionally controlled by the states—civil confinement of the mentally ill.[217]

Foucha confused the standard even more. The plurality in *Foucha* apparently used strict scrutiny review, measuring Louisiana's law against such standards as "narrowly focused," "carefully limited," and "sharply focused."[218] But the plurality applied this standard of review only after it determined that

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212. *See* Foucha v. Louisiana, 504 U.S. 71, 80 (1992); Jones v. United States, 463 U.S. 354, 362 (1983); Addington v. Texas, 441 U.S. 418, 426 (1979).

213. *See, e.g.*, Symposium, *Predators and Politics: A Symposium on Washington's Sexually Violent Predators Statute*, 15 U. PUGET SOUND L. REV. 507 (1992).

214. *See, e.g.*, Stephen R. McAllister, *The Constitutionality of Kansas Laws Targeting Sex Offenders*, 36 WASHBURN L.J. 419, 450 (1997) (stating that level of review is a "subsidiary" issue). *But see* John Kip Cornwell, *Confining Mentally Disordered "Super Criminals": A Realignment of Rights in the Nineties*, 33 HOUS. L. REV. 651, 674–89 (1996) (discussing his reasoning for espousing a "particularly exacting" standard of review).

215. *See* JEROME A. BARRON ET AL., CONSTITUTIONAL LAW: PRINCIPLES AND POLICY 559–60 (5th ed. 1996).

216. *See Jones*, 463 U.S. at 361.

217. *See* Kansas v. Hendricks, 117 S. Ct. 2072, 2081 (1997). If an area of law traditionally controlled by the states is involved, the Court will often apply more deferential review. *See, e.g.*, Lalli v. Lalli, 439 U.S. 259, 268 & n.6 (1978) (recognizing, in an equal protection case based on illegitimacy, that states "have an interest of considerable magnitude" in the disposition of estates, and recognizing that this state interest distinguished *Lalli* from other illegitimacy cases); Patterson v. New York, 432 U.S. 197, 201 (1977) ("[P]reventing and dealing with crime is much more the business of the States than it is of the Federal Government,...and...we should not lightly construe the Constitution so as to intrude upon the administration of justice by the individual States." (citation omitted)); *see also* Brief for Petitioner at 28–30, Kansas v. Hendricks, 116 S. Ct. 2522 (1996) (No. 95-9075) (arguing for rational basis review on ground that states have traditionally had broad power in committing the mentally ill).

218. *See* Foucha v. Louisiana, 504 U.S. 71, 81–83 (1992).

Louisiana's law required no form of mental infirmity.[219] Therefore, a fundamental liberty right was still involved, but no traditional area of control for the states was involved.[220] Some courts and commentators, however, applied *Foucha* more broadly to mean strict scrutiny review for any civil commitment law.[221] *Hendricks* clearly limited *Foucha*, though, and marked a "return" to more deferential judicial review of civil commitment.[222]

The *Hendricks* Court recognized that freedom from physical restraint is a "core liberty" right but then quickly pointed out that it is not absolute.[223] Rather, the Court had "consistently upheld...involuntary commitment statutes" that confine people who cannot control their behavior and who thus "pose a danger to the public health and safety."[224] The basis for such confinement is "dangerousness" and "some additional factor" that renders a person unable to control his dangerousness.[225] The Court then specifically recognized that it had "traditionally left to legislators the task of defining" this additional factor because it is a term of a "medical nature that [has] legal significance."[226] The Court did not probe into the "mental abnormality" term used by Kansas' Act, but rather reviewed it in a very superficial manner. Because "mental abnormality" requires a condition affecting "volitional capacity," which renders the person more likely to commit sexually violent offenses, it has a reasonable connection to the dangerousness element and to the need to confine people in order to protect the safety of others.[227] The Court did not delve into the term's circularity problem because it found the term to result from a reasonable legislative judgment.[228]

The standard of review after *Hendricks* is plain: If a state requires any form of mental infirmity as a basis for commitment, the state will receive rational basis review with regard to the sufficiency of the mental infirmity required. This truly is only one step away from confinement solely on the basis of dangerousness because a state can decrease the mental infirmity requirement by more and more minute degrees—all the while, only needing to be rational.[229]

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219. *See id.* at 80.

220. This analysis in *Foucha* was more akin to that of *Salerno*, where strict scrutiny is applied to the confinement of dangerous but nonmentally ill people. *See supra* note 12 (discussing the *Salerno* analysis and why it is irrelevant in civil commitment cases).

221. *See, e.g.*, Cornwell, *supra* note 214, at 676–77; Morris, *supra* note 4, at 599 n.35.

222. *See supra* text accompanying notes 200–03.

223. *See* Kansas v. Hendricks, 117 S. Ct. 2072, 2079 (1997).

224. *Id.* at 2079–80.

225. *See id.* at 2080.

226. *Id.* at 2081.

227. *See id.* at 2080; *see also* KAN. STAT. ANN. § 59–29a02(b) (Supp. 1996) (defining "mental abnormality").

228. See *supra* text accompanying notes 160–61 for a discussion of the term's potential circularity.

229. *See* Foucha v. Louisiana, 504 U.S. 71, 82–83 (1992) (recognizing this danger).

B. The Consequences of Rational Review on a "Mental Illness" Standard

Rational basis review requires "reasonable legislative judgments."[230] But what constitutes a reasonable judgment with regard to mental illness? Somewhere between "mental abnormality"[231] and complete sanity[232] lies a point beyond which states cannot confine people as mentally ill. Two feasible alternative standards remain after *Hendricks*: (1) any volitional impairment that renders a person dangerous beyond his control,[233] or (2) any medical justification.[234]

The *Hendricks* Court seemed to define "mental illness" as any factor that "narrows the class of persons eligible for confinement to those who are unable to control their dangerousness."[235] This standard omits the need for any medical diagnosis of a mental abnormality.[236] In fact, the Court ruled that medical treatment need not even be available for a condition in order for it to constitute a mental illness.[237] The standard could be met by a requirement of past criminal conduct of a similar nature plus any vague requirement of impulsive behavior.[238]

The difficulty with allowing such vague requirements is that, in a real court setting, a jury may rely solely on the past criminal conduct as proof of inability to control behavior.[239] In that case, the state could commit people for an indefinite period of time solely on the basis of dangerousness, a principle that the Supreme Court has greatly limited.[240]

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230. *See* Jones v. United States, 463 U.S. 354, 365 n.13 (1983).

231. *See Hendricks*, 117 S. Ct. at 2080.

232. *See Foucha*, 504 U.S. at 82.

233. *See Hendricks*, 117 S. Ct. at 2080.

234. *See Foucha*, 504 U.S. at 88 (O'Connor, J., concurring); *see also Hendricks*, 117 S. Ct. at 2080–81 (citing O'Connor's standard of "some medical justification").

235. *See Hendricks*, 117 S. Ct. at 2080.

236. *See* La Fond, *supra* note 17, at 698–99 (arguing that sexually violent predator laws detach civil commitment from any medical rationale).

237. *See Hendricks*, 117 S. Ct. at 2084. This conclusion is logical since Kansas confined sexual predators under its police power rather than under its parens patriae power. *See id.* at 2079–80; *supra* text accompanying notes 3–6. Andrew Hammel proposed that mental illness should be limited to treatable conditions, *see* Andrew Hammel, Comment, *The Importance of Being Insane: Sexual Predator Civil Commitment Laws and the Idea of Sex Crimes as Insane Acts*, 32 HOUS. L. REV. 775, 802 (1995), but the Court obviously refrained from imposing such a standard.

238. *See* Reardon, *supra* note 163, at 852 (Reardon explained that the logic could boil down to the fact that "[i]f you commit more than...one offense, the likelihood of doing it again goes up; therefore, you *must* have a mental abnormality or personality disorder that makes you likely to commit these...crimes.").

239. *See* Wettstein, *supra* note 160, at 602 (recognizing potential for subjective interpretations of standards by jurors). FED. R. EVID. 404 exists to protect defendants from the logic of a juror that if a defendant committed a similar crime in the past, the chances are greater that she committed the present crime. This same logic will be employed by jurors when determining if an individual can control his behavior.

240. *See Hendricks*, 117 S. Ct. at 2080 ("A finding of dangerousness, standing

Justice O'Connor's standard of "some medical justification" is also quite deferential, but it is more objective. States would still have much leeway but would, at least, have to show some kind of a connection to a medically supported mental infirmity.[241] This would make it more difficult for states to "make up" mental infirmities in order to commit specific groups of individuals. For instance, the statute at issue in *Hendricks* did require some proof of a "condition" that affected volitional capacity to find a "mental abnormality"—mere impulsiveness was not enough.[242] Hendricks suffered from pedophilia, a disorder recognized by the *DSM–IV*.[243] Therefore, although the Court in *Hendricks* conceived of a new "impulsiveness" standard, the facts are more in line with Justice O'Connor's standard of "some medical justification."

A state should not completely disregard the field of medicine when it is making determinations to confine people on a medical basis; this would not be rational.[244] A state, however, should be allowed to pick and choose between the varying medical principles available, as long as its choice is reasonable.[245] More importantly, a state should not be constitutionally required to *match* its legislative definitions of mental infirmities with specific medical principles, but rather the Constitution should require only that a state's definitions be *justified by* medical principles.[246] This gives states the flexibility intended under rational basis review.

C. Does Antisocial Personality Disorder Suffice for the "Mental Illness" Standard

To clarify the "mental illness" and dangerousness standard after *Hendricks*, it will be helpful to look at a hypothetical statute. Justice Souter furnished such a hypothetical during oral arguments for *Hendricks*: a civil confinement law for individuals who committed prior criminal acts—for example, armed robbery—and who suffer from antisocial personality disorder.[247] At present,

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alone, is ordinarily not a sufficient ground upon which to justify indefinite involuntary commitment."); *see also supra* note 116 and accompanying text (discussing limited permissibility of confining individuals based solely on dangerousness).

241. *See* Foucha v. Louisiana, 504 U.S. 71, 88 (1992) (O'Connor, J., concurring) (stating that "some medical justification" is required to assure "the necessary connection between the nature and purposes of confinement").

242. *See* KAN. STAT. ANN. § 59–29a02(b) (Supp. 1996); *Hendricks*, 117 S. Ct. at 2080.

243. *See* DSM–IV, *supra* note 155, at 527–28.

244. *See* Jones v. United States, 463 U.S. 354, 365 n.13 (1983) (stating that legislative judgments must be reasonable).

245. *See Hendricks*, 117 S. Ct. at 2088 (Breyer, J., dissenting) ("The Constitution permits a State to follow one reasonable professional view, while rejecting another.").

246. *See id.* at 2081 (holding that legal definitions of terms of a medical nature do not have to fit precisely with the medical community's definitions).

247. *See* Linda Greenhouse, *Justices Display Two Moods on Confining Sex Offenders*, N.Y. TIMES, Dec. 11, 1996, at A1 (describing a question asked by Justice Souter of Kansas' counsel).

many states explicitly omit antisocial personality disorder as a basis for confinement under their general civil commitment statutes.[248]

The *DSM–IV* defines antisocial personality disorder as "a pervasive pattern of disregard for, and violation of, the rights of others that begins in childhood or early adolescence and continues into adulthood."[249] For a diagnosis of antisocial personality disorder: (1) the individual must be at least eighteen years old;[250] (2) there must be evidence of Conduct Disorder, which includes aggression toward people and animals, destruction of property, deceitfulness or theft, or serious violations of rules;[251] and (3) there must be a "pervasive pattern of disregard for and violation of the rights of others occurring since age 15 years, as indicated by three (or more) of the following": a failure to conform to laws, deceitfulness, impulsivity, irritability and agressiveness, reckless disregard for safety of self and/or others, consistent irresponsibility, and a lack of remorse.[252] Importantly, the *DSM–IV* distinguishes antisocial personality disorder from general criminal behavior. "Only when antisocial personality traits are inflexible, maladaptive, and persistent and cause significant functional impairment or subjective distress do they constitute Antisocial Personality Disorder."[253]

Since the hypothetical statute requires a prior criminal act for civil commitment, the dangerousness requirement should be met based on Supreme Court precedent.[254] However, this conclusion may not be true for all prior crimes. In *Foucha*, Justice O'Connor distinguished between violent crimes and nonviolent, minor crimes, stating that the latter may not be sufficient evidence of dangerousness.[255] The *Hendricks* Court did not rule out this potential distinction because, although it found Hendricks' prior crimes to evidence his dangerousness, those crimes were sexually violent offenses committed against young children.[256] The "slippery slope," therefore, may end with individuals who have committed prior violent crimes.[257] Armed robbery, however, is clearly a violent crime; therefore, given the proposed facts, the hypothetical statute would meet the constitutionally required dangerousness element.

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248. *See, e.g.*, ARIZ. REV. STAT. ANN. § 36–501(22) (West 1993) (defining mental disorder under general civil commitment statute to exclude "personality disorders characterized by...antisocial behavior patterns").

249. DSM–IV, *supra* note 155, at 645. The disorder is also referred to as "sociopathy." *Id.*

250. *Id.* at 650.

251. *Id.* at 90, 650.

252. *Id.* at 649–50.

253. *Id.* at 649.

254. *See* Kansas v. Hendricks, 117 S. Ct. 2072, 2080 (1997); Jones v. United States, 463 U.S. 354, 364 (1983).

255. *See* Foucha v. Louisiana, 504 U.S. 71, 88 (1992) (O'Connor, J., concurring).

256. *See Hendricks*, 117 S. Ct. at 2089 (Breyer, J., dissenting).

257. *But see Jones*, 463 U.S. at 359, 364 (holding that Jones' prior criminal act of attempting to shoplift a jacket evidenced his dangerousness).

Since the hypothetical statute requires an antisocial personality disorder, it should also meet the substantive due process standard for committable mental illness. An antisocial personality disorder clearly meets the Court's impulsivity standard advanced in *Hendricks*. The disorder is characterized by impulsiveness, and like the "mental abnormality" requirement in Kansas' Act, it requires functional impairment that leads to a persistent pattern of disregard for the rights of others.[258] Antisocial personality disorder "narrows the class of persons eligible for confinement to those who are unable to control their dangerousness."[259]

Antisocial personality disorder also meets Justice O'Connor's standard of "some medical justification" since it is recognized by the *DSM–IV*.[260] Even if some psychiatrists disagree with the categorization of antisocial personality disorder as a mental illness,[261] the state has the prerogative to choose among professional viewpoints.[262]

Therefore, while it is not clear how far the "slippery slope" stretches, states apparently can civilly confine armed robbers, and other violent criminals, who have an antisocial personality disorder. However, merely because states can enact such civil commitment laws does not mean that they should or will. Civil confinement can be expensive,[263] which certainly will stop many states. In order to avoid civil commitment issues, states may prefer to adopt increased penal sentences for violent offenders.[264]

VI. CONCLUSION

Kansas v. Hendricks provided the Supreme Court a forum to establish the direction of civil commitment laws. The Court used this forum to make clear that legislative definitions of committable mental infirmities will be reviewed under the deferential rational basis standard.[265] However, what constitutes permissible, confinable mental illness is not entirely clear. Two potential standards remain after *Hendricks*: (1) inability to control dangerous behavior or (2) any medical justification. Whichever standard ultimately prevails, the Court will defer to reasonable legislative judgments regarding mental illness.

The Court's deference on this issue worries many commentators and judges because it may impose no limits on whom a state can civilly commit. For

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258. DSM–IV, *supra* note 155, at 649.

259. *See Hendricks*, 117 S. Ct. at 2080.

260. *See* DSM–IV, *supra* note 155, at 645–50; *see also* Cornwell, *supra* note 12, at 1333 (stating that antisocial personality disorder is a confinable mental disorder).

261. *See* Parrish v. Colorado, 78 F.3d 1473, 1477 (10th Cir. 1996), *cert. denied*, 116 S. Ct. 2536 (1996); La Fond, *supra* note 156, at 761 & n.33.

262. *See Hendricks*, 117 S. Ct. at 2088 (Breyer, J., dissenting).

263. *See* La Fond, *supra* note 17, at 701 (discussing the high cost of Washington's sexually violent predator commitment system).

264. *See* Cornwell, *supra* note 12, at 1334–35.

265. *See Hendricks*, 117 S. Ct. at 2080–81.

instance, this Note has concluded that a state can civilly commit individuals who commit violent crimes and who suffer from antisocial personality disorders. Like the elements of criminal laws, however, the Court has traditionally deferred to state legislation regarding civilly confinable mental illness.[266] Therefore, the Court decided that it is still not the time to write a constitutional formula for the amorphous term "mental illness."[267]

266. *See* Brief for Petitioner at 28–30, Kansas v. Hendricks, 116 S. Ct. 2522 (1996) (No. 95–9075).

267. Justice Kennedy, in a concurring opinion in *Hendricks*, left open the possibility of a future, more clear standard, however. *See Hendricks*, 117 S. Ct. at 2087 (Kennedy, J., concurring) ("[I]f it were shown that mental abnormality is too imprecise a category to offer a solid basis for concluding that civil detention is justified, our precedents would not suffice to validate it.").