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Kansas v. Hendricks: Fighting for Children on the Slippery Slope

In *Kansas v. Hendricks*,[1] the United States Supreme Court determined the constitutionality of a civil commitment statute that provides for possible indefinite confinement of sex offenders who are near the end of their prison sentences and who pose a threat to society and suffer from a "mental abnormality." In a five to four decision, the Court reversed the Kansas Supreme Court and upheld Kansas's Sexually Violent Predator Act ("SVPA").[2] In doing so, the Court declared the act nonpenal and rejected due process, double jeopardy, and ex post facto challenges.[3]

I. FACTUAL BACKGROUND

In *Hendricks*, the State filed a petition seeking civil commitment of Leroy Hendricks under Kansas's SVPA.[4] The SVPA, passed in 1994, attempts to reduce the threat that repeat sex offenders pose to society.[5] Before a sex offender can be committed, the SVPA requires that certain criteria are met.[6] First, the individual must have been previously charged with or convicted of a sexually violent offense.[7] Second, the individual must suffer from a mental abnormality or personality disorder.[8] Third, the individual, because of the mental abnormality, must pose a threat to society.[9] If these indicia are met, several procedural steps must be satisfied before the individual is committed.[10] Initially, the State must file a petition seeking confinement.[11] Next, a

1. 117 S. Ct. 2072 (1997).
2. *Id.* at 2086. KAN. STAT. ANN. § 59-29a (1994).
3. 117 S. Ct. at 2086.
4. *Id.* at 2078.
5. *Id.* at 2076.
6. KAN. STAT. ANN. § 59-29a01.
7. *Id.* § 59-29a02.
8. *Id.*
9. *Id.* § 59-29a01.
10. 117 S. Ct. at 2077.
11. *Id.*

hearing is held to determine whether there is probable cause that the individual is a "sexually violent predator."[12] If probable cause is found, the individual must undergo a professional medical evaluation.[13] Finally, a trial is held to find, beyond a reasonable doubt, whether the individual is a sexually violent predator.[14]

Leroy Hendricks was convicted in 1984 for taking "indecent liberties" with two thirteen year-old boys. Prior to that, Hendricks had been convicted four times for similar sex crimes with minors. At the hearing to determine probable cause, Hendricks agreed with a professional evaluation that labeled him as a pedophile. He also admitted that he could not control his urges when he got "stressed out."[15] The jury found Hendricks to be a sexually violent predator beyond a reasonable doubt, and the court determined pedophilia to be a mental abnormality and committed Hendricks.[16]

Hendricks appealed, contending that the SVPA violated due process, double jeopardy, and the ex post facto clause.[17] The Kansas Supreme Court looked only to the due process challenge.[18] It held that the SVPA violated due process by allowing civil commitment based on a finding of dangerousness coupled with a mental abnormality.[19] The court reasoned that the statute's mental abnormality requirement fell below the mental illness requirement affirmed by the United States Supreme Court in *Foucha v. Louisiana*.[20]

The United States Supreme Court granted the State's petition for certiorari and reversed the Kansas Supreme Court.[21] The Court rejected the due process claim, stating that it has "never required state legislatures to adopt any particular nomenclature in drafting civil commitment statutes," and it also dismissed Hendricks's double jeopardy and ex post facto claims.[22]

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12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.* at 2078-79.
16. *Id.* at 2079.
17. *Id.*
18. *In re* Hendricks, 912 P.2d 129, 138 (1996). The Kansas Supreme Court decided the case on Hendricks's due process challenge and therefore did not have to address the double jeopardy or ex post facto challenges.
19. *Id.*
20. *Id.* at 137 (citing Foucha v. Louisiana, 504 U.S. 71 (1992)). The Court in *Foucha* affirmed the holding in *Addington v. Texas*, 441 U.S. 418, 425-33 (1978), requiring that civil commitment be predicated on clear and convincing evidence that the individual was mentally ill and dangerous to others. 504 U.S. at 86.
21. 117 S. Ct. at 2076.
22. *Id.* at 2081.

II. LEGAL BACKGROUND

The Supreme Court announced long ago that a person's civil liberty interest "is not [an] unrestricted license to act according to one's own will."[23] Those restrictions on civil liberty began to take modern form when the Court began considering the constitutionality of civil commitment statutes.

Modern boundaries of civil commitment were initially set when the Court upheld a Minnesota statute in *Minnesota ex rel. Pearson v. Probate Court*.[24] The Court upheld confinement of a dangerous individual with a "psychopathic personality."[25] Rejecting an equal protection challenge, the Court applied a rational basis test to the group affected by the statute and decided that the protection of society was a legitimate concern.[26] A separate due process challenge was defeated because the statute provided adequate procedural safeguards.[27]

In *O'Connor v. Donaldson*,[28] the Court held it unconstitutional for an individual to remain committed if the individual does not pose a threat to society.[29] In that case Donaldson was initially committed because he suffered from "paranoid schizophrenia."[30] During his fifteen years of commitment, Donaldson never exhibited dangerous behavior. In fact, testimony demonstrated that Donaldson never committed a dangerous act.[31] The Court held that Donaldson should have been released, even if the initial confinement was permissible, because "[a] finding of 'mental illness' alone cannot justify a State's locking a person up against his will .... [T]here is still no constitutional basis for confining such persons involuntarily if they are dangerous to no one."[32] Therefore, the Court established that two requirements must be met to justify involuntary confinement—the individual must suffer from a mental illness and must pose a threat to society.[33]

The Court's next major civil commitment case came four years later in *Addington v. Texas*.[34] The Court affirmed the two-part test formu-

23. Jacobson v. Massachusetts, 197 U.S. 11, 27 (1905).
24. 309 U.S. 270 (1940).
25. *Id.* at 271, 277.
26. *Id.* at 274-75.
27. *Id.* at 277.
28. 422 U.S. 563 (1975).
29. *Id.* at 576.
30. *Id.* at 565.
31. *Id.* at 567-68.
32. *Id.* at 575.
33. *Id.* at 576.
34. 441 U.S. 418 (1979).

lated in *O'Connor* for civil commitment and also announced the evidentiary requirements.[35] Appellant contended that the State must prove the two elements beyond a reasonable doubt, while the State argued that a preponderance of the evidence standard should be applied.[36] The Court adopted a middle level "clear and convincing standard."[37] A clear and convincing standard, the Court reasoned, protected individuals against erroneous commitment and also served the legitimate interests of the State.[38]

In *Foucha v. Louisiana*,[39] the Supreme Court held that states may not become too liberal in their commitment practices.[40] Although a review panel recommended that Terry Foucha, an insane acquittee, be conditionally discharged, the State recommitted him. Foucha did not have a mental illness, but the State held him because he demonstrated an antisocial personality, which rendered him a danger to others.[41] Foucha argued his due process rights were violated.[42] The Court agreed and held that an antisocial personality fell below the mental illness requirement.[43]

However, a civil commitment statute may be unconstitutional even though it meets the two-part *O'Connor* test if its proceedings are punitive rather than civil.[44] If an act is punitive, it may offend the Double Jeopardy Clause or the Ex Post Facto Clause.[45] When determining whether the act is civil or punitive, courts look to a variety of factors. First, courts may look to legislative intent.[46] If the legislature's stated intent was to establish a civil proceeding, then the challenging party must show by "'the clearest proof' that 'the statutory scheme [was] so punitive either in purpose or effect as to negate [the State's] intention' to deem it 'civil.'"[47]

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35. *Id.* at 432-33.
36. *Id.* at 421-22.
37. *Id.* at 433.
38. *Id.* at 425-26.
39. 504 U.S. 71 (1992).
40. *Id.* at 86.
41. *Id.* at 75.
42. *Id.*
43. *Id.* at 78.
44. 117 S. Ct. at 2081-82.
45. Schall v. Martin, 467 U.S. 253, 269 (1984).
46. 117 S. Ct. at 2082.
47. *Id.* (quoting United States v. Ward, 448 U.S. 242, 248-49 (1980)). Legislative intent may be shown by placing the statute in the civil code. *Id.* However, the "civil label" is not always dispositive. Allen v. Illinois, 478 U.S. 364, 369 (1986).

Second, courts may look to various provisions of the act. If the act does not require scienter, the act appears civil.[48] Moreover, affirmative restraint does not lead to a punitive conclusion.[49] Also, an act will not necessarily be punitive if it implements procedural safeguards found in criminal trials.[50] Rather, those safeguards ensure that the group intended to be affected is actually the group affected by the statute.[51] Ultimately, the civil or punitive distinction turns on "'whether an alternative purpose to which [the restriction] may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned [to it].'"[52]

III. RATIONALE OF THE COURT

In a five to four decision, the Supreme Court held as constitutional the Kansas civil commitment statute applying to sex offenders who suffer from a mental abnormality making them dangerous to society.[53] In upholding the SVPA, the Court rejected three constitutional attacks.[54]

First, the Court addressed and rejected Hendricks's due process attack that the SVPA's requirement of a mental abnormality fell below the standard of mental illness.[55] While freedom from physical restraint is at the core of the liberty element of the Due Process Clause, the Court noted that this freedom is not unrestricted when those restrictions are necessary for the common good.[56] Moreover, the statute's requirement of a mental abnormality linked to a danger to society comports with previously upheld state civil commitment statutes.[57] While the term "mental illness" is not explicitly used, the Court looked to *Jones v. United States*[58] and acknowledged that state legislatures maintain discretion in drafting civil statutes.[59] The Court also recognized that

48. Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168 (1963). Scienter is a customary element for distinguishing criminal from civil statutes. *Id.*

49. United States v. Salerno, 481 U.S. 739, 746 (1987).

50. 478 U.S. at 371.

51. 117 S. Ct. at 2083.

52. Schall v. Martin, 467 U.S. 253, 269 (quoting *Kennedy*, 372 U.S. at 168-69).

53. 117 S. Ct. at 2086.

54. *Id.*

55. *Id.* at 2081.

56. *Id.* at 2079.

57. *Id.* at 2080 (citing Heller v. Doe, 509 U.S. 312 (1993) (upholding a Kentucky statute permitting commitment of an individual who was "mentally retarded" or "mentally ill" and dangerous), and *Pearson*, 309 U.S. at 270 (upholding a Minnesota statute allowing commitment of a dangerous individual with a "psychopathic personality")).

58. 463 U.S. 354 (1983).

59. *Id.* at 370.

it has previously "used a variety of expressions to describe the mental condition of those properly subject to civil confinement."[60] Thus, because the Kansas statute established similar criteria to other constitutional commitment statutes and because pedophilia is considered a serious mental disorder, the Court found that Hendricks had been afforded due process.[61]

The Court then addressed the double jeopardy and ex post facto challenges using similar reasoning to defeat both claims.[62] The Court determined that because the SVPA is civil in nature, neither constitutional safeguard was offended.[63] Many factors led to this determination. First, the SVPA does not pursue either objective of criminal punishment. It is not retributive because prior criminal conduct does not lead to culpability; rather, the conduct is used only as evidence to demonstrate a danger to society.[64] It is not a deterrent because individuals suffering from mental abnormalities cannot control their conduct despite knowledge of possible negative ramifications.[65]

Second, although the SVPA involves an affirmative restraint, it does not amount to a punitive measure by the state. Restraint of the mentally ill has historically been regarded as nonpunitive. Furthermore, the purpose behind restraint under the SVPA is to provide treatment for those committed until they are no longer threatening to the community. Accordingly, the act provides for the immediate release upon a showing that a committed individual is no longer dangerous.[66]

Third, the Court rejected Hendricks's arguments that punitive intent is shown because the SVPA incorporates procedures used in a criminal proceeding[67] and because commitment may follow a prison term.[68] A state's decision to provide safeguards usually applied in criminal trials does not make the proceeding criminal rather than civil.[69] Instead, the SVPA's requirement that a jury find the individual to be a sexually violent predator beyond a reasonable doubt narrows the class affected

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60. 117 S. Ct. at 2080 (citing *Addington*, 441 U.S. at 425-26, and *Jackson*, 406 U.S. at 732, 737).

61. *Id.* at 2081.

62. *Id.*

63. *Id.* at 2085.

64. *Id.* at 2082. The Court also found that the act was not retributive because criminal conviction is not a prerequisite for commitment under the SVPA. Moreover, the lack of a scienter requirement was further evidence that the SVPA was not intended to be retributive. *Id.*

65. *Id.*

66. *Id.* at 2083.

67. *Id.*

68. *Id.*

69. *Id.*

and ensures that commitment is justified.[70] Finally, the Court cited *Baxstrom v. Herold*[71] and held that commitment following a prison term is not distinguishable from any other commitment.[72] The Court's conclusion that the SVPA is nonpunitive removed an essential prerequisite of double jeopardy and ex post facto claims and mandated that both claims fail.[73]

In a concurring opinion, Justice Kennedy focused on whether the Kansas statute violated the Ex Post Facto Clause.[74] Justice Kennedy stated, "If the object or purpose of the Kansas law had been to provide treatment but the treatment provisions were adopted as a sham or mere pretext, there would have been an indication of the forbidden purpose to punish."[75] However, in this instance, the concurrence concluded that the provisions for treatment and the "attendant protections" demonstrate its nonpunitive purpose.[76] Cautioning against the dangers of civil commitment statutes, Justice Kennedy closed by warning that future statutes will be struck if they fail to administer adequate treatment or provide for commitment without a solid basis.[77]

The dissent, written by Justice Breyer and joined by Justices Stevens, Souter, and Ginsburg, conceded that the SVPA did not violate the Due Process Clause, but did violate the Ex Post Facto Clause.[78] The dissenters accepted Hendrick's contention that the SVPA is punitive for several reasons.[79] First, the Court should give deference to the findings of the state supreme court regarding the intent or purpose of the legislature.[80] The Kansas Supreme Court found that treatment was "incidental at best."[81] Second, the statute committed sex offenders after they served the majority of their criminal sentence.[82] Justice Breyer thought that commitment and treatment should begin much sooner.[83] Third, the statute did not mandate the consideration of less restrictive

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70. *Id.*
71. 383 U.S. 107 (1966).
72. 117 S. Ct. at 2086.
73. *Id.* at 2085-86.
74. *Id.* at 2087 (Kennedy, J., concurring).
75. *Id.*
76. *Id.*
77. *Id.*
78. *Id.* at 2087-88 (Breyer, J., dissenting). Justice Ginsburg joined only Parts II and III of the dissent. Parts II and III addressed the violation of the Ex Post Facto Clause.
79. *Id.* at 2088.
80. *Id.* at 2092 (citing U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779 (1995)).
81. *Id.* (citing *Hendricks*, 912 P.2d. at 136).
82. *Id.* at 2093.
83. *Id.* at 2093-94.

measures such as postrelease supervision or release to a halfway house.[84] Ultimately, the dissent looked to the lack of treatment and decided that "[t]he statutory provisions before us do amount to punishment primarily because . . . the legislature did not tailor the statute to fit the nonpunitive civil aim of treatment."[85]

IV. IMPLICATIONS

The decision in *Hendricks* will have significant implications. First and foremost, it furthers the trend of tightening down on sex offenders. Over the past few years, numerous states have passed "Megan's Laws."[86] Megan's Laws, named after Megan Kanka, a seven year-old girl who was raped and killed by a two-time sex offender, typically require community notification upon the release of sex offenders from prison.[87] Even President Clinton signed a federal version that terminates federal anticrime funding if states do not pass similar laws.[88]

Other states have taken a different route and passed chemical castration laws.[89] Chemical castration statutes are criminal statutes that punish violators. For example, a California statute provides for the chemical castration of convicts after their third conviction for rape or other specified sex offenses.[90] While California's statute offers castration as one alternative for punishment, some state statutes require chemical castration upon conviction.[91]

With the Court holding that the Kansas SVPA is civil, states will now have a much more powerful weapon against sex offenders. States can now commit sex offenders, before they commit another illegal sex act, based on a lower burden of proof. Freedom from confinement will only be granted when the individual shows that he is more likely than not reformed and does not present a danger to society.

Not only will states have far more power to incapacitate sex offenders, it is likely that many states will use this power. Surveys, based only on re-arrests, show sex offenders have alarmingly high rates of recidivism,

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84. *Id.* at 2095 (citing Bell v. Wolfish, 441 U.S. 520, 539 (1979) (holding that failure to consider less harsh alternatives can show the legislature's purpose was to punish)).

85. *Id.* at 2098.

86. Michael G. Planty & Louise van der Does, *Megan's Laws Aren't Enough*, WALL ST. J., July 17, 1997, at A22.

87. *Id.*

88. *Id.*

89. Kenneth B. Fromson, *Beyond an Eye for an Eye: Castration as an Alternative Sentencing Measure*, 113 N.Y.L. SCH. J. HUM. RTS. 311, 316 n.24 (1994).

90. *Id.* at 315.

91. *Id.* Hawaii's proposed statute requires castration of those convicted of first degree sexual assault. *Id.*

ten to forty percent for molesters and seven to thirty-five percent for rapists.[92] Further the average pedophile "commits 282 illegal acts with 150 different victims."[93] Responding to these numbers, thirty-seven states filed amicus briefs supporting Kansas.[94] States like Washington, New York, and Massachusetts, which have had their respective sexual predator statutes struck for constitutional violations, can now pass new statutes.[95] For these states, the Kansas SVPA provides the standard for what is constitutional.

While states have gained considerable power in the defense of society, one must now ask where that power will stop. During oral arguments, Justice O'Connor expressed a similar concern when she asked, "Could a State lock up any kind of violent offender who's diagnosed as having a mental abnormality?"[96] It seems that the criminal system is better suited to administer this type of incarceration. It would be relatively easy for state legislatures to adopt stiffer sentences for sex crimes. Instead, states are able to indefinitely commit sex offenders without having to prove them so beyond a reasonable doubt.

Practically, the issue for civil commitment now becomes what qualifies as a mental abnormality or mental illness. Unfortunately there is no exact answer to this question. The psychiatric field disagrees about what qualifies as a mental illness.[97] The Supreme Court has also used a variety of terms that submit individuals to civil commitment.[98] Therefore, the standard announced in *Hendricks* seems to blur. Without a clear standard, the slippery slope comes into play. How far down the slope will states go in order to protect children, and what personality disorders will provide the basis for future commitment are questions that remain unanswered. For now, the only concrete conclusion is that pedophiles suffer from a legally recognizable mental abnormality.

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92. Planty, *supra* note 86, at A22.

93. *Id.*

94. Carla J. Stovall, *Supreme Court to Consider Law Keeping Predator Confined*, 31-APR Prosecutor 26, 31 (1997).

95. Cindy Moy, *Sexually Violent Predator Acts Face More Constitutional Challenges*, WEST'S LEGAL NEWS, 1996 WL 672399.

96. *Hendricks*, WL 721073 (1996).

97. 117 U.S. at 2080-81 (citing Ake v. Oklahoma, 470 U.S. 68, 81 (1985)).

98. *Id.* at 2081.