THE EVIL THAT MEN DO: PERVERTING JUSTICE TO PUNISH PERVERTS

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As a society, we are revolted at repeated, sexual, violent conduct perpetrated against women and children. States enacted sexual psychopath legislation years ago to address the problem. That answer proved inadequate and was abandoned. But the problem persists. Within the last decade, states began enacting sexually violent predator (SVP) legislation as a new, and politically popular, solution. Typically, after an individual identifiable as an SVP serves a criminal sentence, he is subjected to civil commitment and detained indefinitely. In Kansas v. Hendricks*, 521 U.S. 346 (1997), by the narrowest of margins, the Supreme Court upheld the Kansas SVP statute against several constitutional attacks. With this Supreme Court imprimatur, SVP legislation has become the wave of the present.*

Many scholars have asserted that the Supreme Court wrongly decided Hendricks *and that SVP legislation is unconstitutional. Professor Morris reviews their arguments and concludes that after* Hendricks*, they are not likely to succeed. Professor Morris notes, however, that the Supreme Court did not consider an equal protection attack on SVP legislation. He explains why an equal protection challenge claiming that SVPs are similarly situated with other civilly committed patients is likely to fail. Nevertheless, Professor Morris asserts that a properly framed equal protection claim could and should succeed. He explains why, based on other Supreme Court decisions, SVP legislation impermissibly discriminates against sentence-expiring convicts, incompetent criminal defendants, and nondangerous insanity acquittees by exempting from SVP commitment other individuals who are equally mentally disordered and dangerous.*

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I. CHANGING THE LEOPARD'S SPOTS: FROM SEXUAL PSYCHOPATHS TO SEXUALLY VIOLENT PREDATORS[1]

The year 2000 marks the tenth anniversary of laws enacted to civilly commit individuals identified as sexually violent predators (SVPs). The State of Washington enacted the first SVP legislation in 1990,[2] only six years after repealing its sexual psychopath commitment statutes.[3] In essence, SVP legislation was a reincarnation—a second generation, if you will—of sexual psychopath legislation. Through sexual psychopath legislation, enacted in more than half the states by the mid-1960s,[4] criminal defendants charged with or convicted of sex crimes and facing a determinate sentence could be detained indefinitely for treatment until they were no longer dangerous.[5] Sexual psychopath legislation was discredited, however, by the inability of psychiatrists and other mental health professionals to identify a specific mental disorder experienced by individuals who should be included within the targeted group and by the lack of successful treatment methodologies to improve their condition.[6] The absence of treatment destroyed any valid basis for distinguishing sexual psychopath prisoners from other prisoners in order to subject them to indeterminate commitment.[7]

In 1981, the State of Washington enacted a Sentencing Reform Act that replaced indeterminate sentencing with determinate sentencing.[8] Three years later, Washington ended its sexual psychopath experiment,[9] supplanting indeterminate, and largely unsuccessful, treatment of sexual psychopaths with lengthy, but determinate, sentencing of sex offenders. The Sentencing Reform Act was specifically designed to "[e]nsure that the punishment for a criminal offense is proportionate to the seriousness

1. The metaphor was chosen deliberately. Leopards, after all, are predators.

2. *See* Sexually Violent Predators, 1990 Wash. Laws ch. 3 (codified at WASH. REV. CODE ANN. ch. 71.09 (West 1992 & Supp. 2000)).

3. *See* WASH. REV. CODE ANN. ch. 71.06 (West 1989), *repealed prospectively by* Sexual Psychopaths, 1984 Wash. Laws ch. 209, § 27 (codified at WASH. REV. CODE ANN. § 71.06.005 (West 1992)).

4. *See* Barbara A. Weiner, *Mental Disability and the Criminal Law*, *in* AMERICAN BAR FOUNDATION, THE MENTALLY DISABLED AND THE LAW 693, 739 (Samuel J. Brakel et al. eds., 3d ed. 1985).

5. *See id.* at 740–41.

6. *See id.* at 741–43. Sexual psychopath legislation was also challenged on procedural due process grounds. For example, in *Specht v. Patterson*, 386 U.S. 605 (1967), a unanimous Supreme Court ruled that the possibility of indeterminate confinement based on a new finding of fact—that the person constitutes a threat of bodily harm to the public, or is an habitual offender and mentally ill—entitled the person subjected to commitment under Colorado's Sex Offenders Act to the full panoply of due process protections, including the right to counsel, to have an opportunity to be heard, to be confronted with witnesses, to cross-examine, to offer evidence of his own, and to have findings adequate to make a meaningful appeal. *See id.* at 609–10.

7. *See* Millard v. Cameron, 373 F.2d 468, 473 (D.C. Cir. 1966).

8. Sentencing Reform Act of 1981, 1981 Wash. Laws ch. 137 (codified at WASH. REV. CODE ANN. §§ 9.94A.010–.910 (West 1998 & Supp. 2000)).

9. *See* WASH. REV. CODE ANN. ch. 71.06 (West 1989), *repealed prospectively by* Sexual Psychopaths, 1984 Wash. Laws ch. 209, § 27 (codified at WASH. REV. CODE ANN. § 71.06.005 (West 1992)).

of the offense and the offender's criminal history"[10] and to "[p]rotect the public."[11] Nevertheless, that Act was unable to prevent a series of heinous sexual crimes committed by individuals who had been recently released from criminal confinement.[12] Responding to public outrage,[13] the Washington Legislature enacted its SVP legislation to reestablish indeterminate commitment of dangerous sexual offenders. But unlike its sexual psychopath predecessor, which *substituted* indeterminate treatment for determinate punishment, the SVP statutes *added* indeterminate confinement upon completion of the offender's criminal sentence. Within five years, a handful of states, including Kansas, followed Washington's lead and adopted virtually identical legislation.[14]

10. WASH. REV. CODE ANN. § 9.94A.010 (West Supp. 2000).

11. *Id.*

12. *See* Brian G. Bodine, Comment, *Washington's New Violent Sexual Predator Commitment System: An Unconstitutional Law and an Unwise Policy Choice*, 14 U. PUGET SOUND L. REV. 105, 105 n.1 (1990) (discussing two crimes); Beth K. Fujimoto, Comment, *Sexual Violence, Sanity, and Safety: Constitutional Parameters for Involuntary Civil Commitment of Sex Offenders*, 15 U. PUGET SOUND L. REV. 879, 882 n.15 (1992) (discussing three crimes).

13. Michael Perlin has written extensively about the "heuristic of the statistically-exceptional but graphically-compelling case" of the randomly violent, mentally disordered person and the use of mistaken "ordinary common sense" by courts and legislatures to generalize and wrongly stereotype persons with mental disorder in order to justify prejudiced decision making against them. Michael L. Perlin, *"Half-Wracked Prejudice Leaped Forth": Sanism, Pretextuality, and Why and How Mental Disability Law Developed as It Did*, 10 J. CONTEMP. LEGAL ISSUES 3, 29 (1999); *see also* Michael L. Perlin, *"The Borderline Which Separated You from Me": The Insanity Defense, the Authoritarian Spirit, the Fear of Faking, and the Culture of Punishment*, 82 IOWA L. REV. 1375, 1420 (1997) ("[T]he insanity defense is a textbook example of the power of heuristic reasoning. . . . [T]he vivid anecdote or the self-affirming attribution overwhelm all attempts at rational discourse."); Michael L. Perlin, *"There's No Success Like Failure/and Failure's No Success at All": Exposing the Pretextuality of* Kansas v. Hendricks, 92 NW. U. L. REV. 1247, 1248 (1998) [hereinafter Perlin, *Exposing the Pretextuality*] (discussing how SVPs have replaced insanity acquittees as the most despised group in society); Michael L. Perlin, *"Where the Winds Hit Heavy on the Borderline": Mental Disability Law, Theory and Practice, "Us" and "Them"*, 31 LOY. L.A. L. REV. 775, 785–87 (1998) (claiming that we distance ourselves from mentally disabled people by believing the myth that most of "them" are dangerous). *See generally* MICHAEL L. PERLIN, THE HIDDEN PREJUDICE: MENTAL DISABILITY ON TRIAL 4–20 (2000) [hereinafter PERLIN, HIDDEN PREJUDICE] (discussing the role of heuristic reasoning generally in the development of mental disability law).

14. *See* ARIZ. REV. STAT. ANN. §§ 36-3701 to -3716 (West Supp. 1999) (originally enacted as Crimes—Sexually Violent Predators, 1995 Ariz. Sess. Laws ch. 257); CAL. WELF. & INST. CODE §§ 6600–6609.3 (West 1998 & Supp. 2000) (originally enacted as Sexually Violent Predators, 1995 Cal. Stat. ch. 763, § 3); KAN. STAT. ANN. §§ 59-29a01 to -29a20 (1994 & Supp. 1999) (originally enacted as Civil Commitments—Sexually Violent Predators, 1994 Kan. Sess. Laws ch. 316); MINN. STAT. ANN. § 253B.185 (West Supp. 2000) (originally enacted as Psychopathic Personalities—Sexually Dangerous Persons, Sexual Psychopaths—Civil Commitment, 1994 Minn. Laws, 1st Sp. Sess., ch. 1, art. 1, § 3, which defined "sexually dangerous person" in § 253B.02(18c)); WIS. STAT. ANN. §§ 980.01–.13 (West 1998 & Supp. 1999) (originally enacted as Civil Commitment of Sexually Violent Persons, 1993 Wis. Laws 479, § 40).

II. OF SEXUALLY VIOLENT PREDATORS AND SUPREME COURT DECISION MAKING: *KANSAS V. HENDRICKS*

In 1997, the Supreme Court considered the constitutionality of Kansas's copycat Sexually Violent Predator Act.[15] In *Kansas v. Hendricks*,[16] the Court upheld the statute against three claims of constitutional infirmity.[17] The Court found that the Act satisfied substantive due process requirements.[18] Justice Thomas, writing for the Court's five-justice majority, noted that civil commitment statutes had been sustained when they limited the class of persons eligible for confinement to those who are dangerous and who are unable to control their dangerousness due to mental illness.[19] Although the Kansas statute used the term "mental abnormality" rather than "mental illness," Justice Thomas dismissed the importance of the distinction, declaring that "the term 'mental illness' is devoid of any talismanic significance."[20]

The majority also found that the Act did not violate the Constitution's prohibition against double jeopardy[21] or *ex post facto* lawmaking.[22] The Court accepted as true the legislature's stated intention to create a new civil commitment scheme for SVPs, rather than to inflict additional punishment for past criminal acts.[23] Hendricks failed to sustain the heavy burden of proving that the legislation was punitive either in purpose or effect.[24] Incapacitation[25]—depriving the dangerously mentally ill of their

15. KAN. STAT. ANN. §§ 59-29a01 to -29a20 (1994 & Supp. 1999) (originally enacted as Civil Commitments—Sexually Violent Predators, 1994 Kan. Sess. Laws ch. 316).

16. 521 U.S. 346 (1997).

17. *See id*. at 350.

18. *See id*. at 356–60. U.S. CONST. amend. XIV, § 1 provides that no state "shall . . . deprive any person of . . . liberty . . . without due process of law."

19. *See Hendricks*, 521 U.S. at 358.

20. *Id.* at 359. Justice Thomas used, without attribution, language employed by the Wisconsin Supreme Court two years earlier. *See id*. In a decision upholding the constitutionality of Wisconsin's SVP statutes, the Wisconsin court stated: "[T]here is no talismanic significance that should be given to the term 'mental illness.'" State v. Post, 541 N.W.2d 115, 122 (Wis. 1995), *cert. denied*, 521 U.S. 1118 (1997).

21. *See Hendricks*, 521 U.S. at 360–70. U.S. CONST. amend. V, made applicable to the states through U.S. CONST. amend. XIV, provides that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb."

22. *See Hendricks*, 521 U.S. at 370–71. U.S. CONST. art. I, § 9, cl. 3, made applicable to the states through U.S. CONST. amend. XIV, provides that no "ex post facto Law shall be passed."

23. *See Hendricks*, 521 U.S. at 361. *But see Post*, 541 N.W.2d at 136 (Abrahamson, J., dissenting). In dissenting from a pre-*Hendricks* Wisconsin Supreme Court decision upholding the constitutionality of that state's SVP statutes, Justice Shirley Abrahamson asserted, "If reference to treatment were sufficient to render a statute civil, however, [Wisconsin's statutes that govern] prisons and jails, would be transmogrified into a civil statute." *Id.* at 137.

24. *See Hendricks*, 521 U.S. at 361. In finding that the SVP Act was not proven to have a punitive purpose, the majority noted that, unlike a criminal statute, the Act did "not affix culpability for prior criminal conduct," *id.* at 362, and did not require scienter for commitment. *See id.* The Act did not function as a deterrent because those committed as SVPs are unable to exercise control over their behavior and are "unlikely to be deterred by the threat of confinement." *Id.* at 362–63. Additionally, SVPs experience essentially the same conditions experienced by other civilly committed persons, not the more restrictive conditions experienced by prisoners. *See id.* at 363. The Act's use of criminal-

freedom—is a "legitimate nonpunitive governmental objective."[26] Thus, even if SVPs suffer from an untreatable condition, they may be detained so long as they pose a danger to others.[27] If treatment is possible, the fact that the State provides treatment only incidentally to its primary incapacitation objective does not render the statute punitive.[28] Because the Court found the Act to have a nonpunitive purpose, it could sustain neither a double jeopardy nor an *ex post facto* claim.[29] By the Court's logic, Hendricks was not subjected to multiple punishments because SVP civil commitment is neither punishment that follows a second prosecution for the same crime for which he had served a criminal sentence,[30] nor punishment for conduct that was legal before the statute was enacted.[31]

Although Justice Kennedy joined in the Court's majority opinion, he wrote a short concurring opinion expressing his concern about the use of civil commitment laws to confine those who the criminal process has already punished.[32] He cautioned that if civil confinement is used to achieve retribution or general deterrence rather than mere incapacitation, it cannot be validated.[33] Finally, he declared that if "mental abnormality" proves too uncertain a category to justify civil commitment, the Court should not condone its use.[34]

In Justice Breyer's dissenting opinion, three of the four dissenting justices agreed with the majority that a state may enact separate civil commitment statutes applicable to different categories of committable individuals.[35] Thus, Hendricks could be committed civilly as an SVP because he suffered from a mental disorder—pedophilia—and lacked the ability to control his dangerous actions.[36] Without considering separately whether substantive due process required Kansas "to provide treatment that it concedes is potentially available to a person [who] it concedes is treatable,"[37] the four dissenters focused on the *ex post facto* claim that posed the same issue.[38] In their view, the statute impermissibly imposed punishment by delaying treatment until Hendricks completed his prison sentence.[39] Under the Act, diagnosis, evaluation, and commitment pro-

process-type procedural safeguards to identify those who are civilly committable did not convert the proceedings into criminal proceedings. *See id*.

25. *See id.* at 365.
26. *Id.* at 363.
27. *See id.* at 365–66.
28. *See id.* at 366–67.
29. *See Hendricks*, 521 U.S. at 369.
30. *See id*.
31. *See id.* at 371.
32. *See id.* at 371–72 (Kennedy, J., concurring).
33. *See id.* at 373.
34. *Hendricks*, 521 U.S. at 373.
35. *See id.* at 377 (Breyer, J., dissenting). Justice Ginsberg did not join in this portion of Justice Breyer's opinion and wrote no separate opinion expressing the reasons for her decision. *See id.* at 373.
36. *See id*. at 374–77.
37. *Id.* at 378 (Breyer, J., dissenting).
38. *See id.* at 378.
39. *See Hendricks*, 521 U.S. at 381.

ceedings—prerequisites for treatment—did not occur until the convict's criminal sentence was about to expire.[40] Additionally, when commitment proceedings were conducted, the decision maker was not required to consider less-restrictive alternatives to confinement.[41] And when Hendricks was committed civilly as an SVP, the record supported the Kansas Supreme Court's finding that the State refused to provide treatment.[42]

Although the Court upheld the constitutionality of SVP legislation by the narrowest of margins, many states responded quickly to the *Hendricks* decision by enacting SVP legislation.[43] More can be expected to join them.[44] To avoid constitutional problems, states typically mimic the Washington/Kansas model.[45] SVP statutes have joined lengthened

40. *See id*. at 385.

41. *See id.* at 387.

42. *See id*. at 390; *see also id.* at 392 (finding that "Kansas was not providing treatment to Hendricks"). Under such circumstances, the dissenters agreed with the Kansas Supreme Court's finding that the treatment provisions of the statutes were "somewhat disingenuous." *Id.* at 393 (citing *In re* Hendricks, 912 P.2d 129, 136 (Kan. 1996)).

43. *See, e.g.*, FLA. STAT. ANN. §§ 394.910–.931 (West Supp. 2000); 725 ILL. COMP. STAT. §§ 207/1–207/99 (West Supp. 1999); IOWA CODE ANN. §§ 229A.1–16 (West Supp. 1999); MO. ANN. STAT. §§ 632.480–.513 (West 2000); N.J. STAT. ANN. §§ 30:4-27.24 to .38 (West Supp. 2000); S.C. CODE ANN. §§ 44-48-10 to -170 (Law Co-op. Supp. 1999); TEX. HEALTH & SAFETY CODE ANN. §§ 841.001–.147 (West Supp. 2000); VA. CODE ANN. §§ 37.1-70.1 to .19 (Michie Supp. 1999) (effective Jan. 1, 2001). The Illinois statutes were enacted one week after *Hendricks* was decided. *See* Sexually Violent Persons Commitment Act, 1997 Ill. Laws 90-40 (approved June 30, 1997, effective Jan. 1, 1998). North Dakota enacted its SVP statutes on April 8, 1997, two months prior to the *Hendricks* decision, although the statutes became effective more than a month after *Hendricks* was decided. *See* Civil Commitment of Sexually Dangerous Individuals, 1997 N.D. Laws 243, § 1 (approved and filed Apr. 8, 1997) (codified at N.D. CENT. CODE §§ 25-03.3-01 to -21 (Supp. 1999)).

44. In *Hendricks*, 38 states, the District of Columbia, and three territories joined in an amicus brief supporting Kansas's position that SVP legislation is an appropriate and constitutional method to protect citizens from sexually dangerous persons. *See* Brief of the States of Washington et al. as Amici Curiae, Kansas v. Hendricks, 521 U.S. 346 (1997) (No. 95-1649), *available at* 1996 WL 471076, at *4 (addressing the substantive due process issue). The State of Wisconsin wrote a separate amicus brief addressing *ex post facto* and double jeopardy issues. *See* Brief of Amicus Curiae State of Wisconsin, *Hendricks* (Nos. 95-1649, 95-9075), *available at* 1996 WL 469205, at *1–2. The multistate brief expressed its approval of, and expressly adopted, Wisconsin's arguments. *See* Brief of the States of Washington et al. as Amici Curiae, *Hendricks* (No. 95-1649), *available at* 1996 WL 471076, at *2.

45. For example, many of the statutes begin with a declaration borrowed, nearly verbatim, from the Washington/Kansas model:

> 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 the existing involuntary [civil commitment law], which is intended to be a short-term civil commitment system that is primarily designed to provide short-term treatment to individuals with serious mental disorders and then return them to the community. In contrast to persons appropriate for civil commitment . . . , 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 legislature further finds that sex offenders' likelihood of engaging in repeat acts of predatory sexual violence is high. The existing involuntary commitment [laws are] inadequate to address the risk [of reoffense]. The legislature further finds that the prognosis for curing sexually violent offenders is poor, the treatment needs of this population are very long term, and the treatment modalities for this population are very different than the traditional treatment modalities for people appropriate for commitment under [the existing involuntary civil commitment law].

WASH. REV. CODE ANN. § 71.09.010 (West 1992); *see also* KAN. STAT. ANN. § 59-29a01 (Supp. 1999).

States that begin their SVP Acts with a similar statement of legislative findings include: Sexually Violent Persons, 1995 Ariz. Sess. Laws ch. 257, § 10 (the legislature's findings are found in the notes to

criminal sentences and sex offender registration and public notification laws[46] as politically expedient controls on those who have committed violent sexual offenses and who might do so again in the future.

III. OF SEXUALLY VIOLENT PREDATORS AND SUPREME COURT DECISION MAKING: CRITICAL COMMENTARY

Despite their popularity with state legislatures, scholars have denounced SVP legislation[47] and have condemned the *Hendricks* decision—especially Justice Thomas's majority opinion—for upholding their constitutionality.[48] Michael Perlin excoriated *Hendricks* as not merely "a

ARIZ. REV. STAT. ANN. § 36-3701 annot. sec. 10(3) (West Supp. 1999)); Sexually Violent Predators, 1995 Cal. Stat. ch. 763, § 3 (the legislature's findings are found in the historical and statutory notes to CAL. WELF. & INST. CODE § 6600 annot. (West 1998)); FLA. STAT. ANN. § 394.910 (West Supp. 2000); IOWA CODE ANN. § 229A.1 (West Supp. 2000); N.J. STAT. ANN. § 30:4-27.25 (West Supp. 2000); S.C. CODE ANN. § 44-48-20 (Law Co-op. Supp. 1999).

46. *See, e.g.*, N.J. STAT. ANN. §§ 2C:7-1 to -11 (West 1995 & Supp. 1999).

47. Even prior to the *Hendricks* decision, many scholars strongly criticized SVP legislation. *See, e.g.*, Andrew Horwitz, *Sexual Psychopath Legislation: Is There Anywhere to Go but Backwards?*, 57 U. PITT. L. REV. 35 (1995); Eric S. Janus, *Sex Offender Commitments: Debunking the Official Narrative and Revealing the Rules-in-Use*, 8 STAN. L. & POL'Y REV., Summer 1997, at 71; 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 (1992) [hereinafter La Fond, *A Deliberate Misuse*]; Steven J. Schulhofer, *Two Systems of Social Protection: Comments on the Civil-Criminal Distinction, with Particular Reference to Sexually Violent Predator Laws*, 7 J. CONTEMP. LEGAL ISSUES 69 (1996); Robert M. Wettstein, M.D., *A Psychiatric Perspective on Washington's Sexually Violent Predators Statute*, 15 U. PUGET SOUND L. REV. 597 (1992). *But see* John Kip Cornwell, *Protection and Treatment: The Permissible Civil Detention of Sexual Predators*, 53 WASH. & LEE L. REV. 1293 (1996) [hereinafter Cornwell, *Protection and Treatment*] (arguing that SVP statutes are constitutional); Alexander D. Brooks, *The Constitutionality and Morality of Civilly Committing Violent Sexual Predators*, 15 U. PUGET SOUND L. REV. 709 (1992) (asserting the constitutionality of SVP legislation). John La Fond responded promptly to the article by Alexander Brooks. *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 (1992) [hereinafter La Fond, *A Response*]. For an extensive list of articles on SVP legislation, see 1 MICHAEL L. PERLIN, MENTAL DISABILITY LAW: CIVIL AND CRIMINAL § 2A-3.3, at 76–77 n.193 (2d ed. 1998) & 5–6 n.193 (Supp. 1999). For an extensive list of SVP litigation, see *id.* at 77–79 n.196 (2d ed. 1998) & 6–8 n.196 (Supp. 1999).

48. The Index to Legal Periodicals lists 34 articles written about *Hendricks* and published from the date of the Supreme Court decision on June 23, 1997, through December 1999. *See* 37 INDEX TO LEGAL PERIODICALS AND BOOKS 1151, 1155 (Richard A. Dorfman ed., 1998); 38 INDEX TO LEGAL PERIODICALS AND BOOKS 1363, 1366 (Richard A. Dorfman ed., 1999); 93 INDEX TO LEGAL PERIODICALS AND BOOKS 288, 289 (No. 1, Oct. 1999); 93 INDEX TO LEGAL PERIODICALS AND BOOKS 370 (No. 2, Nov. 1999); 93 INDEX TO LEGAL PERIODICALS AND BOOKS 160 (No. 3, Dec. 1999). Many of these articles are student casenotes or comments highly critical of the decision. *See, e.g.*, Kimberly A. Dorsett, Note, Kansas v. Hendricks*: Marking the Beginning of a Dangerous New Era in Civil Commitment*, 48 DEPAUL L. REV. 113 (1998); Adam J. Falk, Note, *Sex Offenders, Mental Illness and Criminal Responsibility: The Constitutional Boundaries of Civil Commitment After* Kansas v. Hendricks, 26 AM. J.L. & MED. 117 (1999); Anne C. Gillespie, Note, *Constitutional Challenges to Civil Commitment Laws: An Uphill Battle for Sexual Predators After* Kansas v. Hendricks, 47 CATH. U. L. REV. 1145 (1998); Jeffrey R. Glovan, Case Note, *"I Don't Think We're in Kansas Anymore, Leroy":* Kansas v. Hendricks *and the Tragedy of Judicial Restraint*, 30 MCGEORGE L. REV. 329 (1999); Rebecca Kessler, Note, *Running in Circles: Defining Mental Illness and Dangerousness in the Wake of* Kansas v. Hendricks, 44 WAYNE L. REV. 1871 (1999); Beverly Pearman, Note, Kansas v. Hendricks: *The Supreme Court's Endorsement of Sexually Violent Predator Statutes Unnecessarily Expands State Civil Commitment Power*, 76 N.C. L. REV. 1973 (1998).

constitutionally indefensible and intellectually muddled opinion. . . . It is bad law, bad social policy, and bad mental health."[49] Perlin identified eleven ways[50] in which *Hendricks* demonstrated "meretricious pretextuality that is outcome-driven, acontextual and amoral."[51] In a recent symposium on sex offenders, authors of seven of the eight articles directly addressing *Hendricks* either disagreed with the Court's analysis or expressed concern about the ambiguities and implications of the decision.[52] The author who wrote the one article in support of *Hendricks* was an individual who served as a Special Assistant Attorney General for the State of Kansas when the Supreme Court heard the *Hendricks* case.[53]

Scholarly critique has centered on the criteria for SVP commitment—especially the "mental abnormality" language used in the Kansas statute to define an SVP.[54] The statute authorizes civil commitment of those who have a legislatively defined mental abnormality, even if they do not have a clinically recognized mental disorder that is traditionally required for civil commitment under other statutes.[55] The provisions, charged Stephen Morse, "are vague and even incoherent definitions of *abnormally* produced sexual danger"[56] that do not "make any rational sense on [their] own terms."[57] The term "mental abnormality" is "circu-

49. Perlin, *Exposing the Pretextuality*, *supra* note 13, at 1249.

50. *See id.* at 1269–75.

51. *Id.* at 1249. Perlin defined "pretextuality" as the willingness of courts to "accept, either implicitly or explicitly, testimonial dishonesty and [to] engage similarly in dishonest decisionmaking." *Id.* at 1252. *See generally* PERLIN, HIDDEN PREJUDICE, *supra* note 13, at 59–75 (discussing generally the role of pretextuality in the development of mental disability law).

52. *See generally* John Kip Cornwell, *Understanding the Role of the Police and* Parens Patriae *Powers in Involuntary Civil Commitment Before and After* Hendricks, 4 PSYCHOL. PUB. POL'Y & L. 377 (1998) [hereinafter Cornwell, *Role of the Police*]; Eric S. Janus, Hendricks *and the Moral Terrain of Police Power Civil Commitment*, 4 PSYCHOL. PUB. POL'Y & L. 297 (1998); John Q. La Fond, *The Costs of Enacting a Sexual Predator Law*, 4 PSYCHOL. PUB. POL'Y & L. 468 (1998); Stephen J. Morse, *Fear of Danger, Flight From Culpability*, 4 PSYCHOL. PUB. POL'Y & L. 250 (1998) [hereinafter Morse, *Fear of Danger*]; Robert F. Schopp, *Civil Commitment and Sexual Predators: Competence and Condemnation*, 4 PSYCHOL. PUB. POL'Y & L. 323 (1998); Jonathan Simon, *Managing the Monstrous: Sex Offenders and the New Penology*, 4 PSYCHOL. PUB. POL'Y & L. 452 (1998); Bruce J. Winick, *Sex Offender Law in the 1990s: A Therapeutic Jurisprudence Analysis*, 4 PSYCHOL. PUB. POL'Y & L. 505 (1998).

Although prior to *Hendricks*, John Kip Cornwell asserted that "sexual predator statutes are constitutional in virtually all respects," Cornwell, *Protection and Treatment*, *supra* note 47, at 1337, and although he continues to support SVP legislation, he acknowledged in his *Psychology, Public Policy, and Law Symposium* article that, "If . . . a state is allowed to confine a 'mentally abnormal' individual without regard to the availability or efficacy of psychiatric treatment, his detention may become, in effect, a life sentence. This result seems ominous . . . ." Cornwell, *Role of the Police*, *supra*, at 404. Because the *Hendricks* majority found that incapacitation of the dangerously mentally ill is itself a permissible governmental objective, *see supra* text accompanying notes 25–27, such a result is possible. Although Cornwell does not believe this result will occur, even he admits, "Time will tell." Cornwell, *Role of the Police*, *supra*, at 413.

53. *See* Stephen R. McAllister, *Sex Offenders and Mental Illness: A Lesson in Federalism and the Separation of Powers*, 4 PSYCHOL. PUB. POL'Y & L. 268 (1998).

54. *See* KAN. STAT. ANN. § 59-29a02(b) (Supp. 1999).

55. *See* La Fond, *A Deliberate Misuse*, *supra* note 47, at 691–95 (discussing the same "mental abnormality" language used in the Washington statute).

56. Morse, *Fear of Danger*, *supra* note 52, at 260.

57. *Id.*

larly defined . . . collap[sing] all badness into madness."[58] The Court frees state legislatures to define mental abnormality as they wish and to decide that those so defined are unable to control their conduct.[59] The definition is so broad, claimed Morse, "that it, in fact, can be applied to *any* behavior."[60] Bruce Winick suggested that if pedophiles can be labeled by legislative fiat as unable to control their strong sexual urges—although no theoretical or empirical support exists for this determination[61]—then *Hendricks*, broadly construed, permits legislatures to invent categories such as "violent hotheads," "violent terrorists," "persistent kleptomaniacs," "dangerous pyromaniacs," and "persistent compulsive gamblers," and subject those so identified to postprison civil commitment.[62] Robert Schopp declared that SVP statutes "are fundamentally deficient because they . . . provide no guidance to decision makers in identifying those who are legally mentally ill."[63]

SVP statutes, assert the critics, are fundamentally deficient for another reason. As Schopp noted, these statutes "provide no explicit or implicit justification for subjecting certain individuals to commitment as well as to criminal prosecution."[64] Without requiring prosecutors to obtain criminal convictions for prohibited acts, SVP laws allow preventive

58. *Id.* at 261. In examining Washington's SVP legislation, John La Fond reached the same conclusion. He declared the legislature's attempt to conflate both diagnosis and prediction of dangerousness into the definition of mental abnormality as "circular reasoning at its worst! This so called pathology is neither medicine nor science; it is legislative legerdemain." La Fond, *A Response*, *supra* note 47, at 764. The "magic" analogy was also used by Morse in another article critiquing SVP legislation. He declared, "Medicalization of violent sexual predation is legal prestidigitation that wrongly justifies the unjustifiable." Stephen J. Morse, *Blame and Danger: An Essay on Preventive Detention*, 76 B.U. L. REV. 113, 141 (1996) [hereinafter Morse, *Blame and Danger*].

59. *See* Morse, *Fear of Danger*, *supra* note 52, at 264. By conjuring up the image of "predators," the state is permitted "to exercise power, unmediated by scientific concerns, on those deemed 'monstrous.'" Simon, *supra* note 52, at 459.

60. Morse, *Fear of Danger*, *supra* note 52, at 261. The editors of the *Harvard Law Review* agree with this assessment, opining that the Supreme Court's amorphous language could be construed to permit states to civilly commit, for an indeterminate term, recidivists unable to control their actions—including drunk drivers, drug offenders, and possibly anyone else who can be labeled mentally abnormal and potentially dangerous. *See The Supreme Court, 1996 Term—Leading Cases*, 111 HARV. L. REV. 51, 266–69 (1997); *see also* Dorsett, *supra* note 48, at 139–42. Dorsett asserts that the Supreme Court's failure to provide adequate guidance regarding the terms "mental abnormality" and "dangerousness" "has effectively given the states authority to involuntarily commit virtually anyone." *Id.* at 144.

61. *See* Winick, *supra* note 52, at 521.

62. *Id.* at 525–30.

63. Schopp, *supra* note 52, at 342–43. In dissenting from a pre-*Hendricks* Wisconsin Supreme Court decision upholding the constitutionality of that state's SVP statutes, Justice Shirley Abrahamson asserted: "If the constitutionally prescribed threshold of mental illness has no core meaning and can mean everything, then it means nothing." State v. Post, 541 N.W.2d 115, 142 (Wis. 1995) (Abrahamson, J., dissenting), *cert. denied*, 521 U.S. 1118 (1997). In another pre-*Hendricks* decision, Justice Alan Page, dissenting from a Minnesota Supreme Court decision upholding the constitutionality of that state's SVP statutes, asked: "Today the target is people who are sexually dangerous. Which class of people, who are different from us and who we do not like, will it be tomorrow?" *In re* Linehan, 557 N.W.2d 171, 202 (Minn. 1996) (Page, J., dissenting), *vacated and remanded for reconsideration in light of* Hendricks *sub nom.* Linehan v. Minnesota, 522 U.S. 1011 (1997).

64. Schopp, *supra* note 52, at 343.

detention of allegedly dangerous individuals who would be found criminally responsible and subject to criminal punishment if they committed those acts.[65] "[I]t seems perverse," wrote Morse, "to claim that a person is responsible enough to deserve criminal punishment—the most serious, afflictive state intrusion on liberty—but is *not* responsible enough to avoid preventive confinement for potential harmdoing."[66] The line between civil and criminal is obliterated if a state can punish a person as criminally responsible for his actions and then, upon completion of that sentence, civilly commit him as mentally abnormal and unable to control his dangerousness.[67] "*Hendricks* jettisons culpability *and* nonresponsibility as predicates for confinement and declares open season on pure preventive detention without admitting or perhaps even recognizing that it is doing this."[68]

Critics have also challenged the *Hendricks* majority's reliance on incapacitation as a sufficient nonpunitive objective, in and of itself, that justifies civil commitment of the dangerously mentally abnormal.[69] Without real treatment for the patient's incapacitating condition, they contend, confinement is punitive.[70] Winick asserted that civilly committing a person without accepting any obligation to provide treatment that will, if successful, restore his or her freedom, raises "grave concerns."[71] Jonathan Simon wrote that "the logic of incapacitation behind the Kansas Act suggests an even grimmer and more dehumanizing view of sex offenders than does traditional punishment."[72] John Parry maintained that it "strains credibility" to conclude that postprison confinement of SVPs is therapeutic—especially when the state withholds treatment while the offender is serving his sentence.[73]

Justice Thomas's majority opinion has also been criticized for failing to address Hendricks's substantive due process claim through a principled analytical framework.[74] Only five years before *Hendricks*, Justice

65. *See, e.g.*, Dorsett, *supra* note 48, at 142–45; Pearman, *supra* note 48, at 2004–05.

66. Morse, *Blame and Danger*, *supra* note 58, at 136. Elsewhere, Morse wrote:

> It is utterly paradoxical to claim that a sexually violent predator is sufficiently responsible to deserve the stigma and punishment of criminal incarceration, but that the predator is not sufficiently responsible to be permitted the usual freedom from involuntary civil commitment that even very predictably dangerous but responsible agents retain . . . .

Morse, *Fear of Danger*, *supra* note 52, at 258.

67. *Hendricks* places at risk "the moral legitimacy of the criminal law." Janus, *supra* note 52, at 322.

68. Morse, *Fear of Danger*, *supra* note 52, at 259.

69. *See supra* text accompanying notes 21–31.

70. *See infra* notes 71–73 and accompanying text.

71. Winick, *supra* note 52, at 536. Although he repeatedly notes that Justice Thomas's opinion is ambiguous and may be read as rejecting treatability as a prerequisite for commitment, Winick expresses hope that future Supreme Court cases will interpret *Hendricks* more narrowly so that psychiatric hospitals will not be converted into long-term custodial warehouses and so that the distinction between civil and criminal commitment will be retained. *See id.*

72. Simon, *supra* note 52, at 465–66.

73. John W. Parry, *Highlights & Trends*, 23 MENTAL & PHYSICAL DISABILITY L. REP. 137, 144 (1999).

74. *See* Falk, *supra* note 48, at 132–40.

Thomas, dissenting in *Foucha v. Louisiana*,[75] described the analytical framework for evaluating substantive due process claims as "relatively straightforward. Certain substantive rights we have recognized as 'fundamental'; legislation trenching upon these is subjected to 'strict scrutiny,' and generally will be invalidated unless the State demonstrates a compelling interest and narrow tailoring."[76] In that dissent, he berated the majority for ignoring that framework.[77]

In *Foucha*, the plurality opinion used language that departs from the "strict scrutiny"/"rational basis" dichotomy traditionally employed to review substantive due process and equal protection claims: "Freedom from physical restraint being a fundamental right, the State must have a particularly convincing reason . . . for such discrimination . . . ."[78] Justice O'Connor's concurring opinion did not specifically articulate the applicable standard of review but merely asserted that confinement might be permissible if "the nature and duration of detention were tailored to reflect pressing public safety concerns related to the [detainee's] continuing dangerousness."[79]

And yet, in *Hendricks*, Justice Thomas did not consider whether Kansas's SVP commitment statute deprived Hendricks of a fundamental right,[80] and if so, whether the deprivation satisfies the test of strict scrutiny. Justice Thomas simply accepted, at face value, the State's categorization of SVP commitment as "civil" and imposed upon Hendricks the heavy, if not impossible, burden of establishing by the clearest proof, that the legislative scheme was punitive.[81]

Any involuntary confinement is a physical restraint of the body, depriving the individual of freedom. In *Foucha*, the Court found that freedom from physical restraint is *the* core liberty interest protected by the

75. 504 U.S. 71, 102 (1992) (Thomas, J., dissenting).

76. *Id.* at 115.

77. *See id.* at 115–16.

78. *Id.* at 86 (White, J., plurality opinion). Justice White wrote the majority opinion for Parts I and II of *Foucha*, and a plurality opinion for Part III. The quotation is taken from Part III.

79. *Id.* at 87–88 (O'Connor, J., concurring).

80. The Supreme Court has acknowledged that confinement for compulsory psychiatric treatment is "a massive curtailment of liberty." Humphrey v. Cady, 405 U.S. 504, 509 (1972). Those who are involuntarily hospitalized are categorized as "mental patients" and are subjected to psychiatric treatment that probes their innermost thoughts and to psychotropic medication that dulls and alters those thoughts. *See* Heller v. Doe, 509 U.S. 312, 324–25 (1993). Forced administration of psychotropic medication during trial may violate a criminal defendant's constitutional right to a fair trial. *See* Riggins v. Nevada, 504 U.S. 127, 133–38 (1992). Indeed, the Supreme Court has acknowledged that under the Due Process Clause, even sentence-serving convicts possess "a significant liberty interest in avoiding the unwanted administration of antipsychotic drugs." Washington v. Harper, 494 U.S. 210, 221–22 (1990). "The forcible injection of medication into a nonconsenting person's body represents a substantial interference with that person's liberty." *Id.* at 229. Involuntarily confined patients may also be subjected to mandatory behavior modification programs. *See, e.g.*, Vitek v. Jones, 445 U.S. 480, 492 (1980). People who are involuntarily hospitalized because they are dangerous are stigmatized by that finding. *See* Addington v. Texas, 441 U.S. 418, 425–26 (1979). Such stigma "can have a very significant impact on the individual." *Id.* at 426.

81. *See* Kansas v. Hendricks, 521 U.S. 346, 361 (1997).

Constitution from arbitrary governmental action.[82] It is difficult to understand how the core liberty interest protected by the Constitution could be characterized as anything less than fundamental.[83] One critic opined that the *Hendricks* "Court's departure from its traditional framework suggests that the Court questioned whether the Kansas law would survive this rigorous examination."[84]

In this article, I will not embellish further on the scholarly critique of *Hendricks*. Suffice to say, I am persuaded that *Hendricks* was wrongly decided and poorly reasoned. Although the arguments against SVP legislation persuade me, they did not, however, persuade the Supreme Court—and they are not likely to do so in the near future. In various forms, these arguments were presented by Hendricks in his briefs to the Court[85] and in six *amicus curie* briefs that supported Hendricks's position[86]—and were rejected by the Court. It is time to end our journey

82. *See* Foucha v. Louisiana, 504 U.S. 71, 80 (1992). The Supreme Court has ruled that even sentence-serving convicts have a liberty interest that protects them against unwarranted administrative transfer from a prison, where they are punished, to a mental hospital, where they are treated involuntarily for their psychiatric conditions. *See* Vitek v. Jones, 445 U.S. 480, 493–94 (1980).

83. In *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942), the Supreme Court noted that whenever "legislation . . . involves one of the basic civil rights of man, . . . strict scrutiny of the classification . . . is essential, lest unwittingly or otherwise invidious discriminations are made against groups or types of individuals in violation of the constitutional guaranty of just and equal laws." *Id.* at 541.

Despite such pronouncement, one critic described Supreme Court equal protection analysis as a "crazy quilt approach" that "lack[s] coherence and consistency." John Marquez Lundin, *Making Equal Protection Analysis Make Sense*, 49 SYRACUSE L. REV. 1191, 1192–93 (1999). He noted that "the Court seems to observe some of its rules of equal protection analysis more in the breach than otherwise." *Id.* at 1193. The Court's equal protection decision making has been strongly criticized, not just by numerous scholars, *see id.* at 1194 n.12 (citing authorities), but also by the justices themselves. *See id.* at 1194 n.13 (quoting statements of Justice Scalia, Justice Stevens, Justice Marshall, and Chief Justice Burger).

Some authors believe that Supreme Court decisions support application of an intermediate-level review of laws permitting involuntary civil commitment of insanity acquittees, criminal defendants found permanently mentally incompetent to stand trial, and SVPs. *See, e.g.*, John Kip Cornwell, *Confining Mentally Disordered "Super Criminals": A Realignment of Rights in the Nineties*, 33 HOUS. L. REV. 651, 669–81 (1996) [hereinafter Cornwell, *Super Criminals*]; Cornwell, *Protection and Treatment*, *supra* note 47, at 1316–19. Cornwell proposes use of a "particularly exacting standard" for such cases. *Id.* at 1317–18; Cornwell, *Super Criminals*, *supra* at 679; *see also* Bodine, *supra* note 12, at 136 (asserting that courts should apply midlevel, heightened scrutiny to SVP equal protection claims because SVPs are a quasi-suspect group). *But see In re* Samuelson, 727 N.E.2d 228, 236 (Ill. 2000) (applying a rational basis test to an SVP equal protection claim).

84. Falk, *supra* note 48, at 133.

85. *See generally* Brief for Leroy Hendricks Cross-Petitioner, Kansas v. Hendricks, 521 U.S. 346 (1997) (Nos. 95-1649, 95-9075), *available at* 1996 WL 450661 (arguing that the Kansas SVP Act is so punitive as to be considered criminal, that the Act violates the constitutional prohibition against *ex post facto* laws, and that the Act violates the constitutional prohibition against double jeopardy); Reply Brief for Cross-Petitioner, *Hendricks* (Nos. 95-1649, 95-9075), *available at* 1996 WL 593579 (arguing that the purpose and effect of the Act is punitive); Brief for Respondent, *Hendricks* (Nos. 95-1649, 95-9075), *available at* 1996 WL 528985 (arguing that the Act violates the substantive protections of the Due Process Clause).

86. *See generally* Brief of the American Civil Liberties Union et al. as Amici Curiae, *Hendricks* (No. 95-1649), *available at* 1996 WL 471020 (arguing that a heightened standard of review is warranted because the Act deprives Hendricks of a fundamental liberty interest and that the Act violates substantive due process because it indefinitely incarcerates individuals who are not mentally ill); Brief for

down dead-end streets. It is time to accept the fact that the Supreme Court has decided *Hendricks* and that SVP legislation has survived the constitutional attacks made against it in that case. But in so doing, we need not accept as fact that SVP legislation is constitutional and will survive *all* constitutional attack. In this article, I will argue that SVP legislation violates equal protection of the laws[87] and that if this issue is properly presented to the Court, SVP statutes will be, or at least should be, struck down.

IV. MOVING BEYOND *HENDRICKS*: EQUAL PROTECTION OR UNEQUAL REJECTION

A. Hendricks *and the Equal Protection Issue*

In *Hendricks*, the Supreme Court did not consider whether SVP legislation violates the Equal Protection Clause. In fact, the words "equal protection" do not appear even once in Justice Thomas's 7096-word majority opinion, in Justice Kennedy's 697-word concurring opinion, or in Justice Breyer's 7923-word dissenting opinion. But Leroy Hendricks raised the issue to the Court.[88]

Before *Hendricks* reached the Supreme Court, the Kansas Supreme Court found that the Kansas SVP statute violated Hendricks's substantive due process rights.[89] Other issues, including Hendricks's claim that the Act denied him equal protection of the laws, were not addressed or

the American Psychiatric Association as Amicus Curiae, *Hendricks* (Nos. 95-1649, 95-9075), *available at* 1996 WL 469200 (arguing that the Act is unconstitutional because it lacks an adequate noncriminal basis); Brief for the National Association of Criminal Defense Lawyers et al. as Amici Curial, *Hendricks* (Nos. 95-1649, 95-9075), *available at* 1996 WL 469202 (arguing that commitment of SVPs is punishment, that punishment for acts committed before the enactment of the statutes violates the *Ex Post Facto* Clause, and that the commitment hearing places Hendricks at risk of a second punishment for the same offense); Brief for the National Mental Health Association as Amicus Curiae, *Hendricks* (No. 95-1649), *available at* 1996 WL 471077 (arguing that substantive due process requires a showing of mental illness and dangerousness before a person can be involuntarily civilly committed; that the amenability to, and availability of, treatment for people with bona fide mental illnesses distinguishes them from SVPs; that committing SVPs to the mental health system will seriously harm people with bona fide mental illness and the public; and that confining SVPs in mental health facilities will further stigmatize people with bona fide mental illness and will discourage them from seeking treatment); Brief of Amici Curiae Seattle-King County Defender Association et al., *Hendricks* (Nos. 95-1649, 95-9075), *available at* 1996 WL 473574 (arguing that the legislative history in other states makes clear the punitive purpose of SVP legislation upon which the Kansas law was based, and the failure to provide constitutionally required treatment to people committed as SVPs demonstrates the Act's punitive intent and violates substantive due process protections); Brief of Amicus Curiae Washington State Psychiatric Association, *Hendricks* (No. 95-1649), *available at* 1996 WL 468611 (arguing that mental illness is not synonymous with mental disorder, that not all sex offenders suffer from a mental disorder or mental illness, that the Act does not require a finding of mental illness, that the Act employs unsound criteria, and that a paraphilia is not the same as mental illness).

87. The Fourteenth Amendment provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

88. *See infra* text accompanying notes 89–102.

89. *See In re* Hendricks, 912 P.2d 129, 138 (Kan. 1996), *rev'd*, Kansas v. Hendricks, 521 U.S. 346 (1997).

decided.[90] When Kansas petitioned for *certiorari* challenging the substantive due process finding,[91] Hendricks cross-petitioned, asserting double jeopardy, *ex post facto*, and equal protection claims.[92] In a memorandum to the Court, Kansas expressed its view that "it would be appropriate for the Court to deal also with these additional objections in the event it grants the State's Petition."[93] In the memorandum, Kansas also informed the Court that it "would argue . . . that the equal protection objection rises or falls with the substantive due process objection."[94] The U.S. Supreme Court granted *certiorari* on both petitions.[95]

The brief submitted for Hendricks as cross-petitioner raised three questions: Was the Kansas SVP Act so punitive in purpose or effect that it must be considered criminal, despite its "civil" label? Did the Act violate the constitutional prohibition against *ex post facto* laws? Did the Act violate the constitutional prohibition against double jeopardy?[96] In a footnote, the cross-petitioner stated: "Mr. Hendricks' cross-petition also sought review of his equal protection challenge to the statute. This claim will be subsumed in his substantive due process argument,[97] and will not be separately briefed."[98] In the brief submitted by Kansas as cross-respondent, Kansas asserted that Hendricks abandoned his equal protection claim by failing to argue its merits in his cross-petitioner's brief and requested that the Court so rule.[99] The State characterized this failure as an apparent attempt to evade the page-limit requirements established by Supreme Court rule[100] "or to manipulate the briefing process" by forcing

90. *See id.* Having decided that the Kansas SVP Act fails to provide substantive due process, the Kansas Supreme Court did not consider any of the other issues raised by Hendricks, specifically, whether the Act violates the federal and state constitutional prohibitions against double jeopardy and *ex post facto* laws, whether the Act fails to provide equal protection and procedural due process, and whether the Act is void as overly broad and vague. *See id.* at 133, 138. In his dissenting opinion, Justice Edward Larson, joined by two other justices, briefly addressed each of these issues and concluded that they were insufficient to deprive the Act of its constitutionality. *See id.* at 140, 150–56 (Larson, J., dissenting). The majority characterized the dissent's discussion of these issues as "dicta . . . that . . . does not warrant a response." *Id.* at 138. Justice Larson's discussion of Hendricks's equal protection claim is addressed *infra* note 106.

91. *See* Petition for a Writ of Certiorari, *Hendricks* (No. 95-1649), *available in* microfiche format.

92. *See* Conditional Cross-Petition, *Hendricks* (No. 95-9075), *available in* microfiche format.

93. Memorandum for Respondent at 2, *Hendricks* (No. 95-9075).

94. *Id.* at 3.

95. *See In re* Hendricks, 912 P.2d 129 (Kan.), *cert. granted*, 518 U.S. 1004 (1996).

96. *See* Brief for Leroy Hendricks Cross-Petitioner, *Hendricks* (Nos. 95-1649, 95-9075), *available at* 1996 WL 450661, at *i.

97. *Id.* at *2 n.1. Hendricks presented his substantive due process argument in his Respondent's Brief. *See generally* Brief for Respondent, *Hendricks* (Nos. 95-1649, 95-9075), *available at* 1996 WL 528985.

98. Brief for Leroy Hendricks Cross-Petitioner, *Hendricks* (Nos. 95-1649, 95-9075), *available at* 1996 WL 450661, at *2 n.1.

99. *See* Brief of Cross-Respondent, *Hendricks* (No. 95-9075), *available at* 1996 WL 509502, at *4, 39–40.

100. Supreme Court Rule 33-1 imposes a 50-page limit on briefs on the merits for petitioner or appellant. *See* 23 JAMES WM. MOORE, MOORE'S FEDERAL PRACTICE Rule 33-1(g)(v) (3d ed. 1999). Hendricks's cross-petitioner brief was 44 pages in length. *See* Brief for Leroy Hendricks Cross-Petitioner, *Hendricks* (Nos. 95-1649, 95-9075), *available at* 1996 WL 450661. The argument that the

the State either to address first the equal protection claim that Hendricks alone had raised or to wait until the State's final reply brief to respond.[101] In his reply brief for cross-petitioner, Hendricks did not address the State's argument.[102]

In its majority opinion, the Supreme Court did not discuss the question of whether Hendricks's equal protection claim could be appropriately subsumed within his substantive due process argument or comment on the State's request for a ruling that Hendricks had abandoned his equal protection claim. Justice Thomas merely noted that Hendricks's cross-petition asserted double jeopardy and *ex post facto* claims.[103]

B. Are SVPs Similarly Situated with Other Civilly Committed Mental Patients?: The "Wrong" Equal Protection Argument

A due process claim focuses on whether the government has treated the individual fairly, regardless of how others in the same situation have been treated. An equal protection claim focuses on whether the government has treated differently individuals who are similarly situated.[104] Hendricks argued to the Kansas Supreme Court that the SVP Act inappropriately distinguished SVPs from other civilly committed mentally ill persons by imposing on SVPs more onerous conditions of confinement and more rigorous standards for release.[105] As mentioned above, the Kansas Supreme Court did not consider this argument, deciding solely that the statute violated substantive due process.[106]

Hendricks's cross-petition to the U.S. Supreme Court reiterated his equal protection claim, charging that persons subject to SVP commitment are treated differently from other prisoners approaching the end of a criminal sentence and differently from nonprisoners subjected to traditional civil commitment.[107] Prisoners nearing the end of their sentences

SVP Act imposed punishment used 14 pages. *See id*. at 23–37. The argument that the Act violated the constitutional prohibition against *ex post facto* laws used two pages. *See id.* at 36–38. The argument that the Act violated double jeopardy used six pages. *See id*. at 38–44. Thus, it appears that Hendricks had sufficient space to separately address the equal protection issue if he had chosen to do so.

101. *See* Brief of Cross-Respondent, *Hendricks* (No. 95-9075), *available at* 1996 WL 509502, at *40.

102. *See* Reply Brief for Cross-Petitioner, *Hendricks* (Nos. 95-1649, 95-9075), *available at* 1996 WL 593579.

103. *See* Kansas v. Hendricks, 521 U.S. 346, 350 (1997).

104. *See* Ross v. Moffitt, 417 U.S. 600, 609 (1974).

105. *See* Brief for Respondent, *Hendricks* (Nos. 95-1649, 95-9075), *available at* 1996 WL 528985, at *7.

106. *See In re* Hendricks, 912 P.2d 129, 138 (Kan. 1996) and *supra* note 90. Justice Larson dissented. *See Hendricks*, 912 P.2d at 140 (Larson, J., dissenting). According to Justice Larson, Hendricks and SVPs were not similarly situated with others, such as those convicted of incest, who were not subject to SVP commitment. *See id*. at 151. Thus, the Kansas SVP Act survived a strict scrutiny equal protection analysis because the Act was narrowly focused on the problem of violent, predatory sex crimes committed by mentally abnormal persons. *See id.* The state had a compelling interest in confining members of this dangerous group. *See id*.

107. *See* Conditional Cross-Petition, *Hendricks* (No. 95-9075), *available in* microfiche format (as on file with the University of Illinois College of Law Library).

face only a period of supervised release but regain most of their liberty.[108] SVPs, in contrast, are confined in secure facilities.[109] For persons subjected to traditional civil commitment, the standards and procedures used to decide whether the initial detention is appropriate, and the standards and procedures used to decide when release is appropriate, differ from those used for commitment and release decisions involving SVPs.[110]

Hendricks gave several examples of these differences. For traditional civil commitment, the Kansas statutes require that the judge find that the person be mentally ill. "Mentally ill person" is defined legislatively as any person who: "1) is suffering from a severe mental disorder to the extent that such 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."[111] Commitment of SVPs requires only a prediction of future dangerousness.[112] Individuals detained under the traditional civil commitment statutes are granted reviews of the commitment decision after ninety days of confinement and every 180 days thereafter.[113] They may petition for release at any time and are entitled to a hearing on each petition.[114] The facility may release a civilly committed patient without any court involvement.[115] In contrast, the status of individuals committed as SVPs is reviewed annually.[116] Requests by SVPs for status-review hearings may be made at other times, but unless they receive the approval of the Secretary of Social and Rehabilitative Services, no hearing is mandated.[117] Release of SVPs requires the approval of a court or jury.[118]

Because the Supreme Court failed to explain why it did not consider Hendricks's equal protection argument, we do not know whether the Court accepted Hendricks's statement that the equal protection argument was "subsumed" in his substantive due process argument or whether the Court was accepting, *sub silencio*, Kansas's request for a

108. *See id.*

109. *See id.* at 7–8.

110. *See id*. at 17–19.

111. *Id.* at 18 (relying upon KAN. STAT. ANN. § 59-2902(h) (1994) (repealed 1996, reenacted in modified form in 1996 and now codified at KAN. STAT. ANN. § 59-2946(e), (f) (Supp. 1999))).

112. *See* Conditional Cross-Petition at 18, *Hendricks* (No. 95-9075), *available in* microfiche format (as on file with the University of Illinois College of Law Library).

113. *See id*. at 19.

114. *See id.*

115. *See id.* As authority, Hendricks relied upon an existing statute outlining rights of civilly committed patients to hearings to review their status, *see* KAN. STAT. ANN. § 59-2919a (1994) (repealed 1996, reenacted in modified form in 1996 and codified at KAN. STAT. ANN. § 59-2969 (Supp. 1999)), and an existing statute authorizing the treatment facility to release a civilly committed patient no longer in need of treatment. *See* KAN. STAT. ANN. § 59-2924(c) (1994) (repealed 1996, reenacted without significant modification in 1996 and codified at KAN. STAT. ANN. § 59-2973(a) (Supp. 1999)).

116. *See* Conditional Cross-Petition at 18, *Hendricks* (No. 95-9075), *available in* microfiche format (as on file with the University of Illinois College of Law Library) (citing KAN. STAT. ANN. § 59-29a08(a) (Supp. 1999)).

117. *See id*. (citing KAN. STAT. ANN. §§ 59-29a10(a), -29a11 (Supp. 1999)).

118. *See* KAN. STAT. ANN. §§ 59-29a08(c), -29a10(b), -29a11 (Supp. 1999).

ruling that Hendricks had abandoned his equal protection claim.[119] But given the Court's rejection of Hendricks's substantive due process argument, it is unlikely that it would have accepted his equal protection argument even if the Court had considered the argument on the merits.

In *Hendricks*, the majority found that the legislature may identify for civil commitment purposes "a limited subclass of dangerous persons."[120] The Kansas SVP Act met that requirement by restricting SVP commitment to individuals who have a mental abnormality or personality disorder rendering them unable to control their dangerousness.[121] Even three of the four dissenting justices agreed that Kansas is not constitutionally prohibited from adopting two separate civil commitment statutes "each covering somewhat different classes of committable individuals."[122] Fifty-seven years earlier, the Supreme Court held that the Minnesota sexual psychopath statute did not violate equal protection, declaring "that the persons within that class constitute a dangerous element in the community which the legislature in its discretion could put under appropriate control."[123]

Prior to the *Hendricks* decision, two state supreme courts considered and rejected equal protection attacks upon their SVP statutes.[124] The Minnesota Supreme Court deferred to the legislature's decision to civilly commit sexually dangerous persons with mental disorders but not sexually dangerous persons without mental disorders. Such a distinction, wrote the court's majority, "helps isolate sexually dangerous persons most likely to harm others in the future. . . . [T]he existence of a mental disorder such as [antisocial personality disorder] identifies a cause of enduring harmful behavior."[125] Limiting SVP commitment to those with mental disorders also serves the State's interest in treating those it confines.[126] Even the two vigorously dissenting justices agreed with the majority's equal protection analysis upholding the legislative judgment that

119. *See supra* text accompanying notes 91–103.

120. Kansas v. Hendricks, 521 U.S. 346, 357 (1997).

121. *See id.* at 358.

122. *Id.* at 377 (Breyer, J., dissenting).

123. Minnesota *ex rel.* Pearson v. Probate Court, 309 U.S. 270, 275 (1940). More recently, the Minnesota Supreme Court upheld the Minnesota Psychopathic Personality Commitment Act against a claim that it violated equal protection. *In re* Blodgett, 510 N.W.2d 910, 916–17 (Minn.), *cert. denied*, 513 U.S. 849 (1994). The court characterized the equal protection claim as "simply a variation of [the] due process argument, and the argument ignores the fact that the sexual predator poses a danger that is unlike any other." *Id.* at 917.

124. A third state supreme court considered more limited equal protection arguments and ruled in favor of the SVP petitioner. *See In re* Young, 857 P.2d 989 (Wash. 1993). The Washington Supreme Court ruled that SVPs are entitled to a probable cause hearing within 72 hours of detention, as was required for persons committed through other civil commitment statutes. *See id.* at 1011. The court also held that less-restrictive alternatives to confinement must be considered, as was required for persons committed through other civil commitment statutes. *See id.* at 1012.

125. *In re* Linehan, 557 N.W.2d 171, 186–87 (Minn. 1996), *vacated and remanded for reconsideration in light of* Hendricks *sub nom.* Linehan v. Minnesota, 522 U.S. 1011 (1997).

126. *See id.* at 187.

SVPs "with a mental disorder are both more dangerous and more amenable to treatment than are those without a mental disorder."[127]

The Wisconsin Supreme Court ruled that "[t]he [S]tate's compelling interest in protecting the public provides the necessary justification for the differential treatment of the class of sexually violent persons whose mental disorders make them distinctively dangerous because of the substantial probability that they will commit future crimes of sexual violence."[128] The legislature may "address complex social problems in more than one way"[129] and may create and implement "a variety of solutions aimed at controlling a variety of ills."[130] The legislature may determine that because of their predisposition to sexual violence, SVPs as a class pose a higher danger to the community than do other mentally ill persons. This heightened danger and the unique treatment needs of SVPs justify a distinct legislative approach to protect the public.[131]

After the *Hendricks* Court placed its imprimatur upon SVP legislation, the California Supreme Court considered, and rejected, an equal protection challenge to the State's SVP Act.[132] The petitioner claimed that he was denied equal protection because the dangerousness commitment criterion was less exacting under the SVP statute than under other civil commitment statutes.[133] The court found that this argument dupli-

127. *Id.* at 200 (Tomljanovich, J., dissenting). Justice Page wrote a separate dissent but expressly joined the dissent of Justice Tomljanovich. *See id.* at 201 (Page, J., dissenting).

128. State v. Post, 541 N.W.2d 115, 130 (Wis. 1995), *cert. denied*, 521 U.S. 1118 (1997).

129. *Id.*

130. *Id.*

131. *See id.* Although the Wisconsin SVP statute survived equal protection challenges to differences in both the substantive standards and the procedures for commitment, the court upheld the right of SVPs to jury trials at discharge hearings as was provided for other civilly committed mental patients. *See id.* at 132–33.

132. *See* Hubbart v. Superior Court, 969 P.2d 584, 604–05 (Cal.), *cert. denied*, 526 U.S. 1143 (1999).

133. *See id.* at 604. Hubbart raised three other equal protection claims in his supplemental brief to the California Supreme Court. However, the court declined to address these claims because they had "not been timely raised or properly presented." *Id.* at 605 n.31. The same three claims were considered on their merits and rejected in a subsequent California Court of Appeal case. *See* People v. Buffington, 88 Cal. Rptr. 2d 696, 700–07 (Ct. App. 1999). Buffington claimed that the SVP Act used a definition of mental disorder and imposed evidentiary standards that were easier to meet for SVP commitment than for other civil commitments and provided less treatment to SVPs than to mentally disordered offenders who were civilly committed for treatment at the completion of their criminal sentences. *See id.* at 700. The court held that for purposes of defining mental disorder and for evidentiary standards used in the commitment process, SVPs are similarly situated to other persons civilly committed as currently mentally disordered and dangerous. *See id.* at 702, 704. Nevertheless, the court found no equal protection violation because the two groups were similarly treated under the law. *See id*. at 704. Because of "contrasting backgrounds and expectations related to treatment," the court found that SVPs were not similarly situated with persons committed as mentally disordered offenders for equal protection purposes regarding treatment. *Id.* at 706. The mental disorder of a mentally disordered offender must, under the statute, "be a cause or an aggravating factor of the violent crime for which the prisoner was sentenced to prison." *Id*. In contrast, no such requirement is imposed on SVPs. The Mentally Disordered Offender Act targets prisoners whose mental conditions may be kept in remission with treatment. *See id.* The SVP Act targets prisoners whose mental conditions pose a risk of future sexually violent behavior. *See id.*

cated in part his due process claim,[134] which the court rejected earlier in the opinion.[135] The court interpreted the Act to require a finding of present dangerousness that was not "materially distinct" from the dangerousness criterion used in other commitment statutes; thus, the petitioner was not subjected to disparate treatment.[136]

In other post-*Hendricks* decisions, the supreme courts of Washington and Illinois also considered, and rejected, equal protection challenges to their states' SVP legislation. The Washington court found that SVPs were not similarly situated with other mentally disordered persons undergoing traditional civil commitment and that differences in the statutes as to who qualifies as an expert to sign a commitment petition was rationally related to the differences between the two groups.[137] The Illinois court held that, without offending equal protection, the legislature may accord different rights to defendants in criminal cases than to persons undergoing civil commitment as sexually violent persons.[138] It is not irrational, wrote the court, for the legislature to distinguish between civil and criminal litigants.[139] The legislature may also accord different rights to persons undergoing civil commitment through provisions of the Illinois Mental Health and Developmental Disabilities Code than to persons undergoing civil commitment through the Sexually Violent Persons Commitment Act.[140] SVPs "present different societal problems" than those who are subject to the regular civil commitment statutes and warrant separate legislative classification.[141]

As these examples indicate, equal protection claims challenging the separate categorization of SVPs for civil commitment purposes are likely to fail. The perceived greater danger from SVPs' conduct will be used by legislatures, and upheld by courts, as justifying their special consideration. Thus, for an equal protection claim to be viable, a different focus is required.

C. Are Sentence-Expiring Convicts and Others Who May Be Identified as SVPs and Subjected to SVP Commitment Similarly Situated with Persons Identifiable as SVPs but Not Subject to SVP Commitment?: The "Right" Equal Protection Argument

1. Targeting Only Some SVPs for SVP Commitment

In upholding the Kansas SVP Act against due process, double jeopardy, and *ex post facto* claims, the *Hendricks* Court found "that the Kan-

134. *See Hubbart*, 969 P.2d at 604.
135. *See id.* at 599–601.
136. *Id.* at 604–05.
137. *See In re* Campbell, 986 P.2d 771, 777 (Wash. 1999).
138. *See In re* Samuelson, 727 N.E.2d 228, 236–37 (Ill. 2000).
139. *See id.*
140. *See id.* at 237.
141. *Id.*

sas Legislature [had] taken great care to confine only a narrow class of particularly dangerous individuals."[142] As the majority construed the Act, SVP commitment was limited to individuals who were dangerous, i.e., likely to engage in predatory acts of sexual violence, and who were unable to control their dangerousness due to mental illness, i.e., mental abnormality or personality disorder.[143] But if the statute is applicable, not to all persons who can be categorized as SVPs, but only to some, then the emperor's clothes, though narrowly tailored,[144] may expose[145] the emperor to an equal protection attack.

The Kansas SVP Act, just as most states' SVP legislation, does not authorize civil commitment of all those who suffer from a mental disorder, no matter how narrowly or broadly defined, and who are likely to engage in predatory acts of sexual violence. Rather, SVP commitment is limited only to persons who fit within one of three groups: persons convicted of a sexual offense who are about to be released from total confinement (hereinafter sentence-expiring convicts); persons found mentally incompetent to stand trial who are about to be released; and persons found not guilty of a sexually violent offense, either because they were legally insane or because they were mentally incapable of possessing the requisite criminal intent, and who are about to be released.[146]

Individuals who do not fit into one of these three categories are not subject to SVP commitment even if they are equally likely to engage in sexually violent conduct and are unable to control their dangerousness due to mental abnormality or personality disorder. Thus, for example, ex-convicts who were punished for sexually violent crimes and who could

142. Kansas v. Hendricks, 521 U.S. 346, 364 (1997). In summarizing the reasons for the Court's decision, Justice Thomas characterized the Act as limiting "confinement to a small segment of particularly dangerous individuals." *Id.* at 368.

143. *See id.* at 358–59. An SVP is defined today as a person "who suffers from a mental abnormality or personality disorder which makes the person likely to engage in repeat acts of sexual violence." KAN. STAT. ANN. § 59-29a02(a) (Supp. 1999). At the time of the *Hendricks* decision, the Kansas statute defined an SVP as a person "who suffers from a mental abnormality or personality disorder which makes the person likely to engage in the predatory acts of sexual violence." Act of May 19, 1994, ch. 316, § 2, 1994 Kan. Sess. Laws 316.

144. To survive strict scrutiny equal protection analysis, the statute must be "narrowly tailored," and the state must demonstrate a compelling interest. *See* Foucha v. Louisiana, 504 U.S. 71, 115 (Thomas, J., dissenting); *supra* text accompanying note 76. "Narrow tailoring" is also required when the Supreme Court utilizes an intermediate scrutiny standard. *See, e.g.*, Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 662 (1994) (stating that intermediate scrutiny requires that legislation be narrowly tailored); Ward v. Rock Against Racism, 491 U.S. 781, 791, 799 (1989) (stating that intermediate scrutiny requires that legislation be narrowly tailored).

145. Exhibitionism is defined in DSM-IV as "the exposure of one's genitals to a stranger." AMERICAN PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (DSM-IV) 525 (4th ed. 1994). Exhibitionism is a diagnosable mental disorder, a form of paraphilia. *See id.* Exhibitionism may also result in criminal prosecution. Under Kansas law, for example, "lewd and lascivious behavior" is a crime committed by "publicly exposing a sex organ or exposing a sex organ in the presence of a person who is not the spouse of the offender and who has not consented thereto, with intent to arouse or gratify the sexual desires of the offender or another." KAN. STAT. ANN. § 21-3508 (Supp. 1999).

146. *See* KAN. STAT. ANN. §§ 59-29a03, -29a04 (Supp. 1999).

be predicted to commit additional sexually violent crimes are not subject to SVP commitment if they already served their criminal sentences and were released from confinement before the SVP Act was enacted. Their mental abnormalities or personality disorders and their inability to control their sexual urges may make them equally dangerous with those whose sentences are about to expire, but they are not members of the limited groups legislatively targeted for special commitment. Criminal defendants charged with, but not yet convicted of, sexually violent offenses and who could be predicted to commit additional sexually violent crimes are not subject to SVP commitment. Individuals who have not yet been charged with sexually violent crimes, and indeed, those who have not yet committed such crimes are not subject to SVP commitment. And yet, their mental abnormalities or personality disorders and their inability to control their sexual urges may make them equally dangerous with those legislatively targeted for special commitment.

For example, a pedophile, who was released after serving ten years in an Illinois prison for sexually molesting children, attempted to lure a young girl into his car.[147] He was apprehended and pled guilty to the crime of child abduction.[148] As his sentence was expiring, the State petitioned for SVP commitment.[149] Despite expert testimony that he had a "lingering sexual penchant for children,"[150] the appellate court dismissed the petition. Child abduction is not a sexually violent offense, and under Illinois law, only those who are completing confinement for a sexually violent offense are subject to SVP commitment.[151] The court rejected the State's argument that SVP commitment is appropriate because the crime, although not specifically defined as violent, was sexually motivated.[152] The perpetrator, according to the State, sought to gratify "an aberrant sexual preference. He wanted to sexually molest his prey."[153] If, as the court assumed, the State correctly assessed the criminal's motivation, would anyone believe that this individual is less sexually dangerous than another pedophile who was not apprehended until after he sexually molested a child and who was therefore subject to SVP commitment?

Although the Supreme Court has permitted the legislature "to recognize degrees of harm, and it may confine its restrictions to those

147. *See In re* Diestelhorst, 716 N.E.2d 823, 824 (Ill. Ct. App. 1999).

148. *See id.* At the time of his release from prison, Diestelhorst was placed on conditional-release status. *See id.* That status was revoked because of his new crime. *See id.*

149. *See id.* at 825. Diestelhorst was convicted of criminal sexual assault and indecent liberties with a child in 1985. *See id*. at 824. He was conditionally released in 1995 and returned to prison that year when his conditional release status was revoked. *See id*. He was required to serve the remainder of his 1985 sentences and a three-year prison term imposed for the crime of child abduction. *See id*. By 1998, he had completed his 1985 sentences, and his 1995 sentence was about to expire. *See id.* at 825.

150. *Id.* at 825.

151. *See id*. at 827.

152. *See* Diestelhorst, 716 N.E. 2d at 827–29.

153. *Id.* at 826.

classes of cases where the need is deemed to be clearest,"[154] the Equal Protection Clause prohibits the legislature from discriminating between individuals when the danger that they pose is equal. The state has no compelling interest to so discriminate. Has the Kansas legislature, and have other state legislatures that followed almost lock-step the *Hendricks*-approved, SVP-commitment statute formula, enacted legislation that will survive an equal protection challenge? If time-honored Supreme Court decisions are truly precedential, the answer should be "no."

2. Sentence-Expiring Convicts

Thirty-four years ago, in *Baxstrom v. Herold*,[155] the Supreme Court held unconstitutional a New York statute that authorized, through administrative decision, the civil commitment of mentally ill, sentence-expiring convicts and their continued confinement in a maximum security mental institution operated by the Department of Corrections.[156] Under the statute, sentence-expiring convicts were the only persons subject to civil commitment who were denied a jury review on the question of whether their mental condition met the civil commitment criteria.[157] They were also the only persons who were denied court hearings on the question of whether they were dangerously mentally ill, a prerequisite for confinement in a maximum security mental institution.[158] Writing for a unanimous Court,[159] Chief Justice Warren rejected the assertion that a person's criminal tendencies or dangerous propensities are established by his or her past criminal record.[160] Equal protection "demands"[161] that sentence-expiring convicts receive the same procedural safeguards that all others receive in the civil commitment process; they cannot be specially classified to avoid the standard procedural roadblocks to civil commitment.[162] Equal protection also demands that they receive the same procedural safeguards that all other civilly committed patients receive before they may be placed in maximum security confinement; they cannot be specially classified to avoid the standard roadblocks to such placement.[163]

Although the *Hendricks* Court did not consider or resolve an equal protection challenge, it was well aware of the *Baxstrom* decision. *Bax-*

154. Minnesota *ex rel.* Pearson v. Probate Court, 309 U.S. 270, 275 (1940).
155. 383 U.S. 107 (1966).
156. *See id.* at 110–11.
157. The statute was enacted in 1929, 1929 N.Y. Laws 243, and codified with subsequent amendments as N.Y. CORRECT. L. § 384. The statute, as it applied to Baxstrom, appears at *Baxstrom*, 383 U.S. at 110 n.2. Following the Supreme Court decision, New York repealed the statute. *See* 1996 N.Y. Laws 891, § 1.
158. *See Baxstrom*, 383 U.S. at 110–13.
159. Justice Black concurred in the result but wrote no opinion. *See id.* at 115.
160. *See id.* at 114.
161. "[D]emands" is the word choice of the Chief Justice. *Id.* at 115.
162. *See id*. at 110–12.
163. *See Baxstrom*, 383 U.S. at 110, 112–15.

strom was discussed and specifically cited in briefs submitted by the State of Kansas[164] and in amicus briefs supporting Kansas's position.[165] *Baxstrom* was discussed and specifically cited by Carla Stovall, Attorney General of the State of Kansas, in her oral argument to the Court.[166] And when Thomas Weilert began his oral argument on behalf of Leroy Hendricks, he completed only five sentences before the Court interrupted him with a question asking about the applicability of *Baxstrom* to the *Hendricks* case.[167] *Baxstrom* was discussed and specifically cited by Justice Thomas in his majority opinion in *Hendricks*,[168] and by Justice Kennedy in his concurring opinion.[169] But in each instance, *Baxstrom* was misused; its precedent distorted.

Justice Thomas, for example, asserted that, in *Baxstrom*, "[W]e expressly recognized that civil commitment could follow the expiration of a prison term . . . ."[170] He neglected to mention, however, that *Baxstrom* prohibits the commitment process for sentence-expiring convicts to be distinguished from the process used for all others undergoing civil commitment. "[T]here is no conceivable basis," wrote Chief Justice Warren, "for distinguishing the commitment of a person who is nearing the end of a penal term from all other civil commitments."[171]

As a result of the *Baxstrom* decision, nearly one thousand sentence-expiring prisoners were discharged from confinement under an unconstitutional law that mandated their placement in maximum security mental hospitals.[172] If convicts were to be civilly committed upon expiration of

164. *See* Brief of Cross-Respondent, Kansas v. Hendricks, 521 U.S. 346 (1997) (No. 95-1649), *available at* 1996 WL 509502, at *46–47 (asserting that adequate procedural rights are provided in the SVP civil commitment process).

165. *See* Brief of Amicus Curiae State of Wisconsin, *Hendricks* (Nos. 95-1649, 95-9075), *available at* 1996 WL 469205, at *8 n.4 (asserting that adequate procedural rights are provided in the SVP civil commitment process); Brief of the Menninger Foundation et al. as Amici Curiae, *Hendricks* (No. 95-1649), *available at* 1996 WL 470942, at *21 (asserting that *Baxstrom* permits civil commitment of sentence-expiring convicts).

166. *See* United States Supreme Court Official Transcript, Dec. 10, 1996, *Hendricks* (Nos. 95-1649, 95-9075), *available at* 1996 WL 721073, at *7 (asserting that *Baxstrom* permits civil commitment of sentence-expiring convicts).

167. *See id.* at *33. A justice asked: "Well, didn't the Court in *Baxstrom* uphold essentially the notion that the State could commit people after they were released from prison in a civil commitment proceeding?" *Id.* Mr. Weilert answered: "I believe the Court upheld that they could commit after a—pardon me. After a criminal sentence if they were mentally ill, yes, Your Honor." *Id.* The answer was unfortunate and unilluminating.

168. *See* Kansas v. Hendricks, 521 U.S. 346, 369–70 (1997).

169. *See id.* at 372 (Kennedy, J., concurring).

170. *Id.* at 369. Justice Kennedy made the same point. *See id.* at 372 (Kennedy, J., concurring).

171. Baxstrom v. Herold, 383 U.S. 107, 111–12 (1966). Would Justice Thomas similarly assert that *Brown v. Board of Education*, 347 U.S. 483 (1954), permits Kansas to racially segregate its schools so long as they provide equal education, ignoring the Supreme Court's finding that "[s]eparate educational facilities are inherently unequal"? *Id*. at 495.

172. Following the *Baxstrom* decision, almost all of the 992 *Baxstrom* patients were civilly committed—using the criteria and procedures applicable to all others who were civilly committed—and placed in Department of Mental Hygiene mental hospitals. *See* Grant H. Morris, *"Criminality" and the Right to Treatment*, 36 U. CHI. L. REV. 784, 793 (1969) [hereinafter Morris, *"Criminality"*]. Within a six-month period, 79 were discharged to the community, 22 were conditionally released on convales-

their criminal sentences, the state was required to use the same civil commitment statutes—the same procedures and same criteria—used to civilly commit any other person, and to commit them to mental hospitals operated by the Department of Mental Hygiene. They could not be separately categorized for civil commitment purposes. SVP legislation, however, does exactly that. If special categorization of sentence-expiring convicts could not withstand even the lowest level, rational basis equal protection scrutiny thirty-four years ago, it should not be able to withstand a heightened level of scrutiny today.[173]

3. Mentally Incompetent Criminal Defendants

Although *Baxstrom* considered only a sentence-expiring convict's right to procedural protections in the civil commitment process and in decisions to place the patient in maximum security confinement,[174] *Jackson v. Indiana*,[175] decided by a unanimous[176] Supreme Court six years later, was not so limited. In *Jackson*, the Court invalidated a statute permitting indeterminate, and potentially lifetime, commitment of a

cent care, 273 were reclassified to voluntary patient status, and 24 were reclassified to informal patient status. *See id*. at 795. Only six had to be transferred back as dangerously mentally ill to maximum security hospitals operated by the Department of Corrections. Within the following six months, an additional 68 *Baxstrom* patients were discharged and only one was transferred to a maximum security hospital. *See id*. The results strongly suggest that psychiatrists: (1) overpredict dangerous mental illness, (2) are unwilling to accept and treat as mental patients those who are identified as "dangerous" or labeled as "criminals," and (3) have the ability to treat such patients when they are integrated with and given treatment indistinguishable from that provided to other civilly committed mental patients. *See id.* at 796; *see also* HENRY J. STEADMAN & JOSEPH J. COCOZZA, CAREERS OF THE CRIMINALLY INSANE 55–161 (1974). Steadman and Cocozza found that the *Baxstrom* patients were not very dangerous and were successfully treated in civil mental hospitals, *see id.* at 108, and that when released to the community, few displayed dangerous behavior. *See id.* at 158; *see also* Grant H. Morris, *The Confusion of Confinement Syndrome: An Analysis of the Confinement of Mentally Ill Criminals and Ex-Criminals by the Department of Correction of the State of New York*, 17 BUFF. L. REV. 651, 670–75 (1968) [hereinafter Morris, *Confusion of Confinement*].

173. Strict scrutiny equal protection analysis was first articulated in 1942. *See* Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535, 541 (1942). Intermediate or midlevel scrutiny, which some authors have suggested is appropriate for SVP-commitment legislation, was first recognized in 1976, ten years after *Baxstrom* was decided. *See* Craig v. Boren, 429 U.S. 190, 210 n.* (1976) (Powell, J., concurring) (noting that "the relatively deferential 'rational basis' standard of review normally applied takes on a sharper focus when [the Court addresses] a gender-based classification"). See *supra* text accompanying notes 82–84 for a discussion of the appropriate level of scrutiny to be applied to SVP-commitment cases.

174. In *Humphrey v. Cady*, 405 U.S. 504 (1972), the Supreme Court applied its *Baxstrom* precedent to an individual convicted of the misdemeanor of contributing to the delinquency of a minor. "In lieu of [a one-year maximum] sentence, he was committed to the 'sex deviate facility,' located in the state prison, for a potentially indefinite period of time, pursuant to the Wisconsin Sex Crimes Act." *Id*. at 506. In other words, he was initially committed for a period equal to the maximum sentence followed by renewable five-year commitment periods. *See id.* at 507. The Court ruled that petitioner's contention that he was denied equal protection in the renewal commitment, which did not accord him the right to a jury trial accorded other persons undergoing civil commitment, was substantial enough to warrant an evidentiary hearing in a federal habeas corpus proceeding. *See id.* at 508.

175. 406 U.S. 715 (1972).

176. Justice Powell and Justice Rehnquist did not participate in the Court's consideration or decision of the case. *See id.* at 741.

mentally defective, deaf mute who had been found incompetent to stand trial.[177] The Court interpreted its *Baxstrom* precedent broadly, stating: "*Baxstrom* held that the State cannot withhold from a few the procedural protections *or the substantive requirements* for commitment that are available to all others."[178] This principle is not limited to sentence-expiring convicts but applies as well to criminal defendants found incompetent to stand trial: "If criminal conviction and imposition of sentence are insufficient to justify less procedural and substantive protection against indefinite commitment than that generally available to all others, the mere filing of criminal charges surely cannot suffice."[179] Equal protection is denied when incompetent criminal defendants are subjected "to a more lenient commitment standard and to a more stringent release standard" than is applicable to all others undergoing civil commitment.[180] SVP legislation, however, does exactly that.

Cross-Respondent's Brief for the State of Kansas[181] and the Amicus Brief for the State of Wisconsin[182] submitted to the Supreme Court in *Hendricks* asserted that the *Baxstrom* equal protection principle was not violated by the Kansas SVP Act because those subjected to SVP commitment were accorded substantial due process protections in the commitment process. Those briefs, however, neglected to mention that *Jackson* extended *Baxstrom*'s protection to the substantive standards for commitment and release. Clearly, SVP legislation subjects sentence-expiring convicts and mentally incompetent criminal defendants to a more lenient commitment standard and to a more stringent release standard than is applicable to all others undergoing civil commitment.

4. Insanity Acquittees

If sentence-expiring convicts and mentally incompetent criminal defendants cannot be specially classified for SVP or other civil commitment purposes, it is logical to assume that any nonconvict cannot be specially classified for that purpose—even if the individual has been "tainted" by his or her involvement in the criminal process.[183] In *Jackson*, for exam-

177. *See id.* at 717–19, 738.

178. *Id.* at 727 (emphasis added).

179. *Id.* at 724.

180. *Jackson*, 406 U.S. at 730. Using a due process analysis, the Court ruled that incompetent defendants who cannot soon be restored to competency must be released or subjected to "the customary civil commitment proceeding that would be required to commit indefinitely any other citizen." *Id.* at 738.

181. Brief of Cross-Respondent, Kansas v. Hendricks, 521 U.S. 346 (1997) (No. 95-1649), *available at* 1996 WL 509502, at *47.

182. Brief of Amicus Curiae State of Wisconsin, *Hendricks* (Nos. 95-1649, 95-9075), *available at* WL 469205, at *8.

183. I do not mean to demonize sentence-serving convicts by suggesting that they are lesser human beings who are entitled to fewer procedural protections in decisions to place them in mental treatment facilities or in the treatment they receive as patients in those facilities. Elsewhere, I have argued that mentally ill convicts who have been transferred from prison to a mental treatment facility

ple, the Court noted that the *Baxstrom* principle had been extended to insanity acquittees in decisions to confine them following their criminal trials.[184] The Court of Appeals for the District of Columbia Circuit,[185] and the highest appellate courts in several states,[186] held that defendants who were absolved from criminal responsibility by insanity verdicts could only be confined using the same procedures and criteria applicable to other nonconvicts undergoing civil commitment.[187]

Nevertheless, in *Jones v. United States*,[188] the Supreme Court held that "insanity acquittees constitute a special class that [can] be treated differently from other candidates for commitment."[189] As a special class, insanity acquittees can be subjected to automatic, indeterminate commitment[190] without first undergoing the civil commitment process.[191] For

"are similarly situated with all other persons who have been removed from society and [civilly committed] for treatment of their mental conditions." Morris, *"Criminality"*, *supra* note 172, at 798. Sentence-serving convicts suffer the same mental disorders as those who are civilly committed. Appropriate treatment and appropriate security safeguards depend, not on their "criminal" status, but on the diagnosis, severity, and pathology of their mental disorders. *See id.* at 796–98; Morris, *Confusion of Confinement*, *supra* note 172, at 661–62.

The Supreme Court has acknowledged that "the involuntary transfer of [a sentence-serving] prisoner to a mental hospital implicates a liberty interest that is protected by the Due Process Clause." Vitek v. Jones, 445 U.S. 480, 487 (1980). The Court has also acknowledged that "involuntary commitment to a mental hospital is not within the range of conditions of confinement to which a prison sentence subjects an individual." *Id.* at 493 (citing Baxstrom v. Herold, 383 U.S. 107 (1966)). Nevertheless, the Court has ruled that a state's interest "in avoiding disruption" in a prison warrants some limitations on procedural protections accorded prisoners in the hearing process in which the transfer decision is made. *Id.* at 496. *See generally* Susan N. Herman, *Slashing and Burning Prisoners' Rights: Congress and the Supreme Court in Dialogue*, 77 OR. L. REV. 1229 (1998) (discussing the current state of prisoners' rights).

184. *See* Jackson v. Indiana, 406 U.S. 715, 724 (1972).

185. *See* Bolton v. Harris, 395 F.2d 642 (D.C. Cir. 1968). Chief Judge David Bazelon, writing for the court, relied on *Baxstrom* as establishing the principle that "the commission of criminal acts does not give rise to a presumption of dangerousness which, standing alone, justifies substantial difference in commitment procedures and confinement conditions for the mentally ill." *Id.* at 647. To confine an insanity acquittee without affording him the standard civil commitment procedural protections denies him equal protection. *See id.* at 652. The court rejected the argument, which the Supreme Court also rejected in *Baxstrom*, that expeditious commitment of nonconvict mentally ill persons is justified because of their dangerous or criminal propensities. *See id.* at 649.

186. *See, e.g.*, State v. Clemons, 515 P.2d 324 (Ariz. 1973); Wilson v. State, 287 N.E.2d 875 (Ind. 1972); People v. McQuillan, 221 N.W.2d 569 (Mich. 1974); State v. Krol, 344 A.2d 289 (N.J. 1975); People v. Lally, 224 N.E.2d 87 (N.Y. 1966); State *ex rel.* Kovach v. Schubert, 219 N.W.2d 341 (Wis. 1974).

187. *See generally* Grant H. Morris, *Dealing Responsibly with the Criminally Irresponsible*, 1982 ARIZ. ST. L.J. 855 (asserting that although insanity acquittees can be subjected to a posttrial evaluation to assess their current mental condition, they should not be distinguished from other nonconvict mentally disordered persons in commitment, release, and treatment decisions); Grant H. Morris, *The Confusion of Confinement Syndrome* Extended*: The Treatment of Mentally Ill "Non-Criminal Criminals" in New York*, 18 BUFF. L. REV. 393 (1969) (asserting that insanity acquittees, incompetent criminal defendants, and dangerous civilly committed persons are not sentence-serving convicts and should not be placed in institutions operated by a department of corrections).

188. 463 U.S. 354 (1983).

189. *Id.* at 370.

190. The statute provides that within 50 days of commitment, a judicial hearing shall be held at which the insanity acquittee can prove his or her eligibility for release. *See* D.C. CODE ANN. § 24-301(d)(2)(A) (1981). At that hearing, the burden of proof is on the insanity acquittee to prove by a

civil commitment generally, the state is required to prove, by clear and convincing evidence, that the person is both mentally ill and dangerous.[192] No such burden is imposed for insanity acquittee commitment. In his criminal trial, Jones pleaded insanity as a defense.[193] The insanity verdict established beyond a reasonable doubt that he committed a criminal act and did so because of mental illness.[194] The legislature may determine that the insanity verdict supports an inference of continuing mental illness[195] and continuing dangerousness.[196] Thus, insanity acquittees can be distinguished from others, such as incompetent criminal defendants, about whom such proof is lacking.[197]

Even if insanity acquittees can be specially classified for post-criminal-trial confinement without undergoing the civil commitment process, their special classification for SVP-commitment purposes cannot be justified. Under the Kansas Act, insanity acquittees are not subject to SVP commitment immediately after their criminal trials, but rather, only after they are about to be released from confinement as insanity acquittees.[198] Such release does not occur until the acquittee is no longer dangerous, i.e., is not likely to cause harm to himself or others.[199] This find-

preponderance of the evidence that he or she is no longer mentally ill or dangerous. *See id.* § 24-301(d)(2)(B).

191. Indeed, at least two current Supreme Court justices construe *Jones* as dealing with criminal, not civil, commitment of insanity acquittees. *See* Foucha v. Louisiana, 504 U.S. 71, 90, 94 (1992) (Kennedy, J., dissenting). Chief Justice Rehnquist joined Justice Kennedy in dissenting. *See id*. at 90. Justice Thomas, joined by Justice Scalia and Chief Justice Rehnquist, wrote a separate dissent, distinguishing insanity acquittees from civil committees. *See id.* at 102. Ironically, in *Kansas v. Hendricks*, 521 U.S. 346 (1997), Justice Kennedy joined in an opinion authored by Justice Thomas upholding the Kansas statutes that established procedures for the *civil* commitment of insanity acquittees and others who were determined to be SVPs. *See id.* at 350, 371.

192. *See* Addington v. Texas, 441 U.S. 418, 432–33 (1979).

193. *See Jones*, 463 U.S. at 360.

194. *See id.* at 363.

195. *See id.* at 366.

196. *See id.* at 364.

197. The Court distinguished insanity acquittees from persons subjected to the regular civil commitment process without any criminal charges brought against them and from criminal defendants found incompetent to stand trial. Incompetent criminal defendants cannot be committed indefinitely because no affirmative proof has been offered that they committed criminal acts or were dangerous. *See id.* at 364 n.12 (discussing Jackson v. Indiana, 406 U.S. 715 (1972)).

Jones was a five-to-four decision. Justice Brennan, joined by Justices Marshall and Blackmun, wrote a dissenting opinion, *see Jones*, 463 U.S. at 371 (Brennan, J., dissenting), and Justice Stevens wrote a separate dissent. *See id.* at 387 (Stevens, J., dissenting). Justice Brennan noted that an insanity trial focuses on the defendant's mental condition in the past, at the time of the alleged criminal act. It does not provide an adequate basis from which to infer the present and future mental condition of the insanity acquittee. *See id.* at 377 (Brennan, J., dissenting). Insanity acquittees are similarly situated with sentence-expiring convicts who can "not be treated differently from other candidates for civil commitment." *Id.* at 376. The *Jones* majority did not "purport to overrule *Baxstrom* or any of the cases which have followed *Baxstrom.* It is clear, therefore, that the separate facts of criminality and mental illness cannot support indefinite psychiatric commitment, for both were present in *Baxstrom.*" *Id.* at 380.

198. *See* KAN. STAT. ANN. §§ 59-29a03, -29a04 (Supp. 1999).

199. *See id.* § 22-3428(3) (authorizing transfer to a less-restrictive hospital environment, conditional release, or discharge); *id.* § 22-3428(7)(b) (defining "mentally ill person" as one who "is likely to cause harm to self or others," and defining "likely to cause harm to self or others"). In many states,

ing of nondangerousness is not easily made. Often, the insanity acquittee's past criminal act—even if committed many years ago—provides sufficient justification for continued detention, trumping clear evidence that he or she is not presently dangerous.[200] Thus, an insanity acquittee who currently suffers from a mental abnormality or personality disorder that renders him likely to engage in repeat acts of sexual violence—the definitional criteria for SVP adjudication[201]—is unlikely to be released from insanity acquittee commitment as not dangerous. In reality, insanity acquittees who are not too dangerous to be released from insanity acquittee confinement but who are dangerous enough to be confined as SVPs do not exist. Insanity acquittees, therefore, are not a special category for SVP-commitment purposes; they are a noncategory.

Perhaps the insanity acquittee category was included in the Kansas SVP-commitment statute as an attempted legislative response to the Supreme Court's 1992 decision in *Foucha v. Louisiana*.[202] There, the Court held that a dangerous, but not mentally ill, insanity acquittee cannot be detained as an insanity acquittee.[203] Employing an equal protection analysis, the Court noted that because the State does not provide for continuing confinement of sentence-expiring convicts who may be dangerous when their sentences expire, it may not continue the confinement of insanity acquittees who may be dangerous but who are no longer insane.[204] The State lacked a particularly convincing reason, said the Court, for discriminating against insanity acquittees who are no longer mentally ill.[205] They are similarly situated with sentence-expiring convicts.[206] If sentence-expiring convicts cannot be separately categorized for civil commitment purposes, insanity acquittees who are no longer mentally ill cannot be so categorized. SVP legislation, however, does exactly that.

insanity acquittees may not be released until a court finds that they are no longer dangerous to others. *See, e.g.*, CAL. PENAL CODE § 1026.2 (West Supp. 2000).

200. *See, e.g.*, State v. Randall, 532 N.W.2d 94, 96 (Wis. 1995). In *Randall*, the petitioner sought release after he had been confined for treatment for more than 15 years following an insanity acquittal for first-degree murder, burglary, and operating a motor vehicle without consent. *See id.* at 98. At the hearing, no evidence was introduced that he had engaged in any recent overt acts demonstrating his current dangerousness. Despite an extensive successful history of unescorted off-grounds activities, including attendance at college courses and steady employment at a local business, *see id.* at 99 n.7, a unanimous jury ordered him recommitted. *See id.* at 99. A subsequent release petition, brought 17 months later, was denied by the trial judge, *see id.* at 100, despite reports of court-appointed psychiatrists that petitioner was not presently mentally ill. *See id.* at 99 n.9. The Wisconsin Supreme Court affirmed. *See id.* at 110. Cornwell cites *Randall* as "a compelling example of the injustice which can flow from the assessment of an individual's continuing dangerousness in the absence of a recent overt act requirement." Cornwell, *Super Criminals*, *supra* note 83, at 728.

201. *See* KAN. STAT. ANN. § 59-29a02(a) (Supp. 1999).

202. 504 U.S. 71 (1992). The Kansas SVP Act was enacted two years after the *Foucha* decision. *See* KAN. STAT. ANN. §§ 59-29a01 to -29a20 (1994 & Supp. 1999) (originally enacted as Civil Commitments—Sexually Violent Predators, 1994 Kan. Sess. Laws ch. 316).

203. *See* Foucha v. Louisiana, 504 U.S. 71, 78 (1992).

204. *See id.* at 85.

205. *See id.* at 86.

206. *See id.* at 85.

Hendricks provides no solace to legislatures that would attempt to continue the confinement of dangerous, but not mentally ill insanity acquittees. Even Justice Thomas acknowledged that dangerousness alone is not a sufficient basis for civil commitment.[207] To justify commitment, proof of dangerousness must be coupled "with the proof of some additional factor, such as 'mental illness' or 'mental abnormality.'"[208] Justice Kennedy, in concurring, noted that Hendricks was diagnosed with pedophilia, a mental disorder described in the DSM-IV.[209] Justice Breyer, in dissenting, also agreed with the majority that Hendricks could be classified as both "'mentally ill' and 'dangerous' as this Court used those terms in *Foucha*."[210] Thus, if an insanity acquittee remains mentally ill and dangerous, *Jones* allows his continued detention as an insanity acquittee; if he is no longer mentally ill, *Foucha* precludes his continued detention as an insanity acquittee, and *Hendricks* precludes his civil commitment as an SVP.

D. Will the "Right" Equal Protection Argument Succeed?

I believe that an equal protection challenge to the Kansas SVP Act or similar legislation using the "right" argument discussed above, should prevail. But I make that assessment as an academic who believes the argument is sound, not as a prognosticator of Supreme Court decision making. Will the five justices who upheld the constitutionality of SVP legislation against claims of substantive due process, double jeopardy, and *ex post facto* violations only a few years ago, be willing to conclude that that same legislation unconstitutionally denies equal protection of the laws to those who are ensnared by it? I am far less optimistic about that prospect. If Perlin correctly analyzed *Hendricks* as being a prime example of an outcome-driven, pretextual decision[211]—and he may well be correct—then few, if any, such justices are likely to be swayed by a well-reasoned equal protection argument.

Nevertheless, a proper analysis of *Baxstrom* and its progeny should strengthen the resolve of the four justices who dissented in *Hendricks*. Justice Breyer, in his dissenting opinion, expressed concern that the Kansas SVP Act authorized confinement only of those who previously committed criminal offenses.[212] He concluded his opinion by finding that the Act imposed punishment because it was not tailored "to fit the nonpunitive civil aim of treatment, which [the State] concedes exists in Hen-

207. *See* Kansas v. Hendricks, 521 U.S. 346, 358 (1997).

208. *Id*.; *see supra* text accompanying notes 19–20. For a critique of *Hendricks*'s expanded definition of the mental illness requirement, see *supra* text accompanying notes 55–63.

209. *See Hendricks*, 521 U.S. at 372 (Kennedy, J., concurring); *supra* note 145.

210. *Hendricks*, 521 U.S. at 377 (Breyer, J., dissenting).

211. *See supra* text accompanying notes 50–51.

212. *See Hendricks*, 521 U.S. at 380 (Breyer, J., dissenting).

dricks' case."[213] The *Hendricks*' dissenters should be receptive to an equal protection claim that the Act impermissibly discriminates against sentence-expiring convicts, incompetent criminal defendants, and insanity acquittees who are no longer dangerous, separately categorizing them as the only candidates for SVP commitment, while exempting others who are equally mentally disordered and dangerous. The basis for such discrimination—that they are about to be released from other confinement—does not justify their special distinction.

Perhaps Justice Kennedy will reconsider his *Hendricks* position in response to an equal protection claim. In his concurring opinion, Justice Kennedy expressed concern that "the practical effect of the Kansas law may be to impose confinement for life."[214] He declared his willingness to find the Act unconstitutional if it "were to become a mechanism for retribution or general deterrence."[215] He may conclude that the Act *is* a mechanism for retribution and general deterrence because of the statute's exclusive purpose—to continue the confinement of sentence-expiring convicts and others who are about to be released from the state's criminal jurisdiction, while exempting others who are equally mentally disordered and dangerous.

Even if the "right" equal protection argument is successful, SVP legislation will not perforce be eliminated. *Hendricks* allows states to enact SVP legislation to civilly commit mentally disordered persons who are unable to control their dangerousness.[216] Such a statutory scheme can be enacted separately and apart from other civil commitment laws. But such laws may not exclusively target sentence-expiring convicts and others who are about to be released from pre-criminal-trial or post-criminal-trial detention. All persons who pose a similar risk of sexual predator dangerousness must be subject to SVP commitment.[217]

Will states reenact SVP legislation if they must spread their net more broadly to include all those whose mental disorder may potentially lead to dangerous sex crimes? The Wisconsin Supreme Court, in considering the "wrong" equal protection attack on the state's SVP statute, and without adequately considering the U.S. Supreme Court's *Baxstrom* precedent, upheld a statute committing sentence-expiring convicts but not others who were not currently incarcerated.[218] The Wisconsin Supreme Court's majority declared: "We agree with the State that it would

213. *Id.* at 396.

214. *Id.* at 372 (Kennedy, J., concurring).

215. *Id.* at 373.

216. *See id*. at 358.

217. Missouri, Kansas's geographical neighbor, recently enacted a statute that applies its SVP criteria to any person who has pled guilty to or been convicted of a sexually violent offense and who has been in custody within the preceding 10 years. *See* MO. ANN. STAT. § 632.484(1) (West 2000). No appellate court has yet considered whether this broadened category of persons subject to SVP commitment insulates the statute from equal protection attack.

218. *See* State v. Post, 541 N.W.2d 115, 133 (Wis. 1995), *cert. denied*, 521 U.S. 1118 (1997); *see also supra* text accompanying notes 128–31.

be difficult, if not impossible, to 'draw the line' if the legislature had attempted to craft a statute encompassing persons in the general community."[219] Will the impossible suddenly become possible if the "right" equal protection argument is made and accepted?

In *Hendricks*, Justice Thomas asserted "that the Kansas Legislature [had] taken great care to confine only a narrow class of particularly dangerous individuals."[220] But under the Kansas statute, not all persons who fit within this narrow class under the statute's SVP definition are subject to SVP commitment.[221] Would even Justice Thomas be willing to reconsider the accuracy of his statement if a state broadened the committable category to encompass, not only sentence-expiring convicts and others who are about to be released from the state's criminal jurisdiction, but all persons within the general community who suffer from a mental abnormality or personality disorder that makes them likely to engage in repeat acts of sexual violence?[222]

Only five years earlier, Justice White, authoring the majority opinion in *Foucha*, cautioned about the need to retain the distinction between civil and criminal commitment.[223] A state cannot confine indefinitely an insanity acquittee who once committed a criminal act but who is no longer insane, even though he has an untreatable antisocial personality that predictably leads to criminal conduct.[224] Similarly, he suggested, a state should not be able to confine indefinitely a convict who once committed a crime and who completed his penal sentence, even though he has an untreatable antisocial personality that predictably leads to criminal conduct.[225] Even more so, a state should not be able to confine indefinitely a person who has not yet committed a crime, even though he has an untreatable antisocial personality that predictably leads to criminal conduct.

Even if the SVP-commitment category—broadened to include all persons within the general community who meet the SVP definition—passes constitutional scrutiny, the legislation may not be administered so as to discriminate against sentence-expiring convicts and others about to be released from the state's criminal jurisdiction. In *Yick Wo v. Hopkins*[226]—a truly venerable precedent—the Supreme Court stated that even if the law appears fair and impartial on its face, "if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between

219. *Post*, 541 N.W.2d at 133.

220. Kansas v. Hendricks, 521 U.S. 346, 364 (1997).

221. *See supra* text accompanying notes 142–53.

222. Under the Kansas Act, an SVP is defined as a person "who suffers from a mental abnormality or personality disorder which makes the person likely to engage in repeat acts of sexual violence." KAN. STAT. ANN. § 59-29a02(a) (Supp. 1999).

223. *See* Foucha v. Louisiana, 504 U.S. 71, 78–83 (1992).

224. *See id.* at 82.

225. *See id.* at 82–83.

226. 118 U.S. 356 (1886).

similar persons in similar circumstances, . . . the denial of equal justice is still within the prohibition of the Constitution."[227] If other SVP-identifiable candidates exist in the community, then business as usual—subjecting to SVP commitment only those who are about to be released from other state control—cannot be countenanced.

V. CONCLUSION

To the ancient Israelites, equal protection of the laws was not merely a constitutional amendment; it was a fundamental precept, commanded of them by God. It was applicable, not just to members of the faith, but also to strangers who came within the jurisdiction of their laws.[228] In the book of Leviticus, at the end of *lex talionus*, the Israelites were instructed: "Ye shall have one manner of law, as well for the stranger, as for the home-born; for I am the LORD your God."[229] And in Deuteronomy, they were told: "Thou shalt not pervert the justice due to the stranger . . . ."[230]

A stranger is more than just someone we do not know.[231] A stranger can be someone who has different beliefs, or whose customs are different, or even who performs acts that are not acceptable to the evaluating group of insiders. In applying our laws and our system of justice to strangers, however, we must accord equal protection not just to those who are not like us, but also, to those we do not like.

We may despise sentence-expiring convicts, believing that they have not been punished enough. If the State of Kansas had not entered into a plea agreement with Leroy Hendricks that provided for a sentence of five to twenty years, he could have been tried and convicted of crimes that would have imposed a sentence of forty-five to 180 years. He would not have been eligible for parole until 2007, when he would be seventy-three years old. Even if he earned all good-time credit, the law would not have required his release until 2074, when he would be 140 years old.[232] Surely, by that ripe, old age his dangerous proclivities would have diminished. And yet, we blame Hendricks because the State willingly agreed to a far shorter sentence in lieu of criminal trial.

We may detest mentally incompetent criminal defendants. After all, their current mental condition precludes a trial for a crime they may

227. *Id.* at 373–74.

228. *See generally* HAIM H. COHN, HUMAN RIGHTS IN JEWISH LAW 149–229 (1984) (discussing rights of equality and justice in Jewish law).

229. *Leviticus* 24:22.

230. *Deuteronomy* 24:17. Earlier, in Exodus, an explanation is given for extending equal protection to strangers: "And a stranger shalt thou not wrong, neither shalt thou oppress him; for ye were strangers in the land of Egypt." *Exodus* 22:20.

231. In ancient Israel, strangers were either resident aliens or foreigners who were in the country temporarily. *See* 15 ENCYCLOPAEDIA JUDAICA 419 (1971).

232. *See* Brief for Respondent, Kansas v. Hendricks, 521 U.S. 346 (1997) (Nos. 95-1649, 95-9075), *available at* 1996 WL 528985, at *1 n.1.

have committed. They may be guilty, but we will never know. We may hate insanity acquittees. After all, their mental condition at the time they acted precludes the imposition of punishment for a criminal act that they committed. We believe we have been cheated because we cannot extract the full pound of flesh to which we feel rightfully entitled. We blame them because we cannot hold them legally blameworthy.

If we could, we would classify these people as "mentally disordered offenders"[233] or as "super criminals."[234] But we cannot so brand them. Sentence-expiring convicts have paid their debt to society; mentally incompetent criminal defendants and insanity acquittees have no debt to pay. If we could, we would lock them up and throw away the key.[235] But we cannot do so. Equal protection prevents us from acting on our prejudices to discriminate against them.

Our attitude towards them suggests that we do not understand or fully appreciate our own system of justice. We may punish those who have done evil. Our criminal process permits us to do so. We may incapacitate those who, if not prevented, will do evil. *Hendricks* expands the civil commitment process to permit us to do so. But we may not, through the guise of incapacitation, single them out for further confinement.[236] When we do so, we pervert justice. Then we, not they, are evil.

233. Cornwell inappropriately categorizes insanity acquittees and permanently incompetent criminal defendants collectively as "mentally disordered offenders." Cornwell, *Super Criminals*, *supra* note 83, at 653.

234. Cornwell also inappropriately categorizes insanity acquittees and permanently incompetent criminal defendants collectively as "super criminals." *Id.* at 669.

235. In *Hendricks*, Justice Kennedy acknowledged that the practical effect of SVP legislation is to impose confinement for life. He cited a Kansas task force member who stated in testimony before the Kansas Senate Judiciary Committee: "So be it." *Hendricks*, 521 U.S. at 372 (1997) (Kennedy, J., concurring).

See *supra* note 200, discussing State v. Randall, 532 N.W.2d 94 (Wis. 1995). Cornwell expresses great concern that continued confinement of insanity acquittees and repeated detention decisions made without proof of a recent, dangerous, overt act "exceeds the government's regulatory interest and resembles more closely an impermissible punitive purpose." Cornwell, *Super Criminals*, *supra* note 83, at 728. Nevertheless, Cornwell specifically excludes from the protection of a recent, dangerous, overt act requirement "certain narrowly defined categories of dangerous offenders, such as pedophiles." *Id.* at 729.

236. Let us not delude ourselves. Lifetime confinement without any realistic prospect of release *is* punishment. David Bazelon, Chief Judge for the U.S. Court of Appeals for the D.C. Circuit, observed that for those we confine as dangerous, the unfulfilled promise of treatment serves "only to bring an illusion of benevolence to what is essentially a warehousing operation for social misfits." Cross v. Harris, 418 F.2d 1095, 1107 (D.C. Cir. 1969). Society may disclaim a punishment agenda, but to the incarcerated person, the confinement is punishment. *See id.* at 1101.

Justice James D. Heiple, dissenting from an Illinois Supreme Court decision upholding the constitutionality of the Illinois SVP statute against an equal protection claim, noted:

> If the Act were truly civil, it would apply to all persons who have a mental disorder of a sexual nature rather than only to those who have been prosecuted for a sexual crime. Similarly, the fact that the Act allows the State to request continued confinement of a defendant whom the State has already chosen to prosecute criminally shows that the State is really merely seeking to impose a supplemental sentence of confinement.

In re Samuelson, 727 N.E.2d 228, 239 (Heiple, J., dissenting).