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KANSAS V. HENDRICKS: IS IT TIME TO LOCK THE DOOR AND THROW AWAY THE KEY FOR SEXUALLY VIOLENT PREDATORS?

Meaghan Downey Kolebuck

I. INTRODUCTION

Leroy Hendricks is every parent’s nightmare. Now in his sixties, Hendricks, a pedophile, has repeatedly molested children throughout his adult life. In 1955, Hendricks pled guilty to indecent exposure after exposing himself to two young girls. Two years later, he was “convicted of lewdness for playing strip poker with a teenage girl.” In 1960, he was imprisoned for three years after molesting two young boys at a carnival. Shortly after his release, Hendricks again was arrested and convicted for molesting a seven-year-old girl. Then, in 1967, he was imprisoned for sexually molesting a young girl and boy. Finally, in 1984, Hendricks was imprisoned for indecent liberties after molesting his stepdaughter and stepson.

In 1994, Hendricks was scheduled to be released from prison after serving nearly ten years for his latest offense. Under the Kansas Sexually

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2. Id.
3. Id.
4. Id.
5. Id.
6. Id.
7. Id.

A review of the most frequently cited cases suggests that recidivism rates [for sex offenders such as Hendricks] range from 10% to 40% for molesters and from 7% to 35% for rapists. If those statistics seem low, remember that they are based on rearrests. Sex crimes are severely underreported. A survey of pedophiles reveals that the average offender commits 282 illegal acts with 150 victims.


Violent Predator Act (the “KSVP Act”), however, Hendricks was invol-
untarily committed to a psychiatric hospital rather than released.9 The
KSVP Act allows for the involuntary commitment of sexually violent
predators, after they serve their time in prison, if they suffer from a
mental abnormality that make them likely to commit predatory acts of
sexual violence.10

Commitment of Sex Offenders,” summarizes how “society has struggled with the question
of what to do with sex offenders.” Howard Zonana, The Civil Commitment of Sex Offend-
ers, 278 SCIENCE 5341 (Nov. 14 1997). He states:
[b]etween 1930 and 1960, a number of states passed ‘sexual psychopath laws’ that
offered indefinite hospitalization and treatment in lieu of incarceration for of-
fenders who committed repetitive sexual crimes. When treatment was not suffi-
ciently effective, and when retribution became a more primary goal than
rehabilitation, these statutes were repealed or fell into disuse. Sex offenders were
then given very long sentences with the opportunity for earlier release if they
were deemed safe by parole boards. This era of so-called ‘indeterminate sentenc-
ing’ was replaced in the 1980s by the present era of ‘determinate sentencing.’ The
mandatory sentence now is based on the average time offenders used to spend in
prison for a given offense under the old indeterminate sentencing system.
One consequence of this policy change in criminal justice has been that offenders
had to be released at the end of a relatively brief fixed sentence, and a number of
them inevitably repeated some particularly heinous crimes. The legislature of the
state of Washington reacted to this by passing the first of the ‘sexual predator’
statutes in 1990. Over the next . . . [five] . . . years, several states [including Kan-
sas] passed similar legislation or revived their old sexual psychopath statutes.
These new statutes permitted state officials, under civil law, to commit offenders
who were considered dangerous if, at the end of their sentence, they met the
criteria of a ‘sexual predator.’ In order to do so, offenders had to have a ‘mental
abnormality’ that would lead to the commission of further crimes.

10. KAN. STAT. ANN. § 59-29a01 (1995). “Predatory” as defined by the Act means:
“acts directed towards strangers or individuals with whom relationships have been estab-
lished or promoted for the primary purpose of victimization.” See id. § 59-20a02(c). “Sex-
ually violent offense” as defined by the Act means:
(1) Rape as defined in K.S.A. 21-3502 and amendments thereto; (2) indecent lib-
erties with a child as defined in K.S.A. 21-3503 and amendments thereto; (3) ag-
graveat indecent liberties with a child as defined in K.S.A. 21-3504 and
amendments thereto; (4) criminal sodomy as defined in subsection (a)(2) and
(a)(3) of K.S.A. 21-3505 and amendments thereto; (5) aggravated criminal sod-
omy as defined in K.S.A. 21-3506 and amendments thereto; (6) indecent solicita-
tion of a child as defined in K.S.A. 21-3510 and amendments thereto; (7)
aggravated indecent solicitation of a child as defined in K.S.A. 21-2511 and
amendments thereto; (8) sexual exploitation of a child as defined in K.S.A. 21-
3516 and amendments thereto; (9) aggravated sexual battery as defined in K.S.A.
21-3518 and amendments thereto; (10) any conviction for a felony offense as de-
Leroy Hendricks recently challenged the constitutionality of Kansas' Sexually Violent Predator Act before the United States Supreme Court in *Kansas v. Hendricks*. Hendricks claimed that, by allowing for the involuntary commitment of sexually violent predators after they serve their time in prison, the KSVP Act violates substantive due process, equal protection, the prohibition against double jeopardy and *ex post facto* laws.

On June 23, 1997, the United States Supreme Court, in a 5 to 4 decision, rendered its opinion in *Kansas v. Hendricks* and upheld the KSVP Act as constitutional. The Court held that the KSVP Act comports with substantive due process because it requires a finding of both dangerousness *and* mental abnormality or personality disorder prior to commitment. The Court stated that it has "sustained civil commitment statutes when they have coupled proof of dangerousness with the proof of some additional factor, such as a 'mental illness' or 'mental abnormality.'" The Court held that "Hendricks' diagnosis as a pedophile, which qualifies as a 'mental abnormality' under the Act . . . plainly suffices for due process purposes."

The opinion rendered by the United States Supreme Court is significant because, prior to June of 1997, at least five state courts had ruled on the constitutionality of sexually violent predator acts similar to Kansas' Sexually Violent Predator Act. The Washington Supreme Court, the Wisconsin Supreme Court and the Minnesota Court of Appeals all upheld their respective state acts as consistent with substantive due pro-
cess.\textsuperscript{18} The United States District Court for the Western District of Washington and the Kansas Supreme Court, however, both concluded their state acts violated substantive due process because they committed individuals to mental institutions who were not "mentally ill."\textsuperscript{19}

This Note analyzes why the United States Supreme Court rightfully upheld the KSVP Act as fully comporting with substantive due process: the Act requires a state to prove, beyond a reasonable doubt, that an individual is both mentally ill and dangerous prior to civil commitment. This Note explains why there is no constitutional or clinical significance to the term "mental illness." Further, this Note analyzes why the United States Supreme Court was correct in requiring proof of something more than mere dangerousness prior to indefinite involuntary commitment under the KSVP Act.

\section{II. The Kansas Sexually Violent Predator Act}

The Kansas Legislature adopted the KSVP Act in 1994 in an attempt to combat the public safety problems caused by recidivist sexual offenders.\textsuperscript{20} The preamble of the Act declares:

The legislature finds that a small but extremely dangerous group of sexually violent predators exist who do not have a mental disease or defect that renders them appropriate for involuntary treatment pursuant to the [existing Kansas involuntary civil commitment statute], which is intended to provide short-term treatment to individuals with serious mental disorders and then return them to the community. In contrast . . ., 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 vio-

\textsuperscript{18} See \textit{In re Linehan}, 544 N.W.2d 308 (Minn. Ct. App. 1996); \textit{In re Young}, 857 P.2d 989 (Wash. 1993); State v. Post, 541 N.W.2d 115 (Wisc. 1995).

\textsuperscript{19} See \textit{Young v. Weston}, 898 F. Supp. 744 (W.D. Wash. 1995); \textit{In re Care and Treatment of Hendricks}, 912 P.2d 129 (Kan. 1996). In \textit{Young v. Weston}, an inmate being held pursuant to Washington's Sexually Violent Predator Confinement Act petitioned for a writ of habeas corpus, claiming that the act was unconstitutional. \textit{Young}, 898 F. Supp. at 749. The United States District Court for the Western District of Washington held "[t]he essential component missing from the Sexually Violent Predator Statute is the requirement that the detainee be mentally ill." \textit{Id.} Washington's Sexually Violent Predator Act, like the KSVP Act, committed sexually violent predators who have been convicted of or charged with a crime of sexual violence and who suffer from a mental abnormality or personality disorder which makes the person likely to engage in predatory acts of sexual violence. \textit{Id.} at 746.

lent behavior. The legislature further finds the sexually violent predators’ likelihood of engaging in repeat acts of predatory sexual violence is high. The existing involuntary commitment procedure . . . is inadequate to address the risk these sexually violent predators pose to society. The legislature further finds that the prognosis for rehabilitating sexually violent predators in a prison setting 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 . . . , therefore a civil commitment procedure for the long-term care and treatment of the sexually violent predator is found to be necessary by the legislature.21

The Act defines a sexually violent predator as a person: 1) who has been “convicted of or charged with a sexually violent offense,” and 2) who “suffers from a mental abnormality or personality disorder which makes the person likely to engage in the predatory acts of sexual violence.”22 The Act defines mental abnormality as “a congenital or acquired condition affecting the emotional or volitional capacity which predisposes the person to commit sexually violent offenses in a degree constituting such person a menace to the health and safety of others.”23

The Act establishes a number of procedures and deadlines regarding civil commitment proceedings.24 Ninety days prior to a prisoner’s anticipated release, the agency with authority over the release must notify the prosecutor in the county where the person was charged.25 The prosecutor then has seventy-five days to file a petition alleging that the person is a sexually violent predator, thus invoking the procedures under the Act.26 After receiving the petition, the district court judge determines whether there is probable cause that the person is a violent sexual predator.27 Upon a finding of probable cause the judge orders the person to be evaluated by a mental health professional.28

The Act also provides an array of procedural safeguards to protect those persons subject to its terms. The district court is required to conduct a trial, within sixty days after the filing of the petition, to determine

21. Id.
22. See id. § 59-29a02(a).
23. See id. § 59-29a02(b)
24. See id. §§ 59-29a03-01.
25. See id. § 59-29a03.
26. See id. § 59-29a04.
27. See id. § 59-29a05.
28. See id. § 59-29a05.
if the person is a sexually violent predator. Persons subject to the Act have a right to counsel, a right to a jury trial, and a right to be examined by their own mental health professional. The Act also prohibits civil commitment unless the state proves beyond a reasonable doubt that the person is a sexually violent predator.

Significantly, the Act continues to provide procedural safeguards once a person has been committed. On an annual basis, the committed person must be re-evaluated and the court must determine whether there is probable cause to believe that the committed person may safely be released. Nothing shall prohibit the committed person from petitioning the court for discharge at this time. If the court determines that probable cause exists, then it must schedule a hearing where it is the State's burden to prove "beyond reasonable doubt that the committed person's mental abnormality or personality disorder remains such that the person is not safe to be at large . . . ." At this hearing, the committed person is entitled to all the constitutional protections that were provided at the initial commitment proceeding.

III. Statement of the Case: Kansas v. Hendricks

Under the procedures of the KSVP Act, a Kansas jury determined that Leroy Hendricks was a sexually violent predator. The evidence established that Hendricks had spent approximately half of his adult life in jail, and after every release, he perpetrated another sexually violent act against a child. Hendricks testified that "when he gets stressed out he is unable to control the urge to engage in sexual activity with a child." He acknowledged that only his death would guarantee an end to his molesta-

29. See id. § 59-29a06.
30. Id.
31. See id. § 59-29a07.
32. See id. §§ 59-29a08, 59-29a10.
33. See id. § 59-29a08.
34. Id. The mental institution may also authorize the committed person to petition the court for release at any time if it determines that the committed person is not likely to commit predatory acts of sexual violence. Id. In this instance, a hearing must be held where the State must prove beyond a reasonable doubt that it is not safe to release the committed person. KAN. STAT. ANN. § 59-29a10 (1995).
36. Id.
38. Id. at 131.
39. Id.
tion of children. Consequently, Hendricks was committed to Larned State Security Hospital in 1994.

Hendricks, however, appealed his commitment to the Kansas Supreme Court, challenging the KSVP Act as unconstitutional. The Kansas Supreme Court held, in In re Care and Treatment of Hendricks, that the KSVP Act did violate the substantive due process clause of the Fourteenth Amendment. The court concluded that the Act permitted the detention of persons who were dangerous but not “mentally ill” and, therefore, violated the United States Supreme Court’s holding in Foucha v. Louisiana. The court reasoned that involuntary commitment requires a finding of “mental illness” and that “mental abnormality,” as defined by the KSVP Act, did not qualify as such. The Kansas Supreme Court, therefore, appears to have adopted the position that the term “mentally ill” denotes a specific or precise medical condition, and that civil commitment statutes must contain the term “mental illness” to withstand any due process challenge.

40. *id.* at 143 (Larson, J., dissenting).
41. *id.* at 131.
43. *id.* at 138. The Kansas Supreme Court arrived at this holding despite the fact that under Kansas law, if the validity of an act is challenged, the court must presume the act is constitutional and resolve all doubts in favor of the validity of the act. *Id.* “If there is any reasonable way to construe the Act as constitutionally valid, [the court] must do so. The Act must clearly violate the constitution before it may be struck down . . . . The burden of proof is on the party challenging the constitutionality of the Act.” *Id.* at 133 (citing Sedlack v. Dick, 887 P.2d 1119 (1995); Chiles v. State, 869 P.2d 707 (Kan. 1994); Boatright v. Kansas Racing Comm’n, 834 P.2d 368 (Kan. 1992).
44. *In re Care and Treatment of Hendricks*, 912 P.2d 129, 138 (Kan. 1996); *See also* Foucha v. Louisiana, 504 U.S. 71, 75-76 (1992) (citing Addington v. Texas, 441 U.S. 418 (1979)) (holding commitment to a mental institution requires state to prove by clear and convincing evidence that the individual is both mentally ill and dangerous).
46. In concluding that no finding of mental illness is required for commitment purposes, the Kansas Supreme Court relied, in part, on the preamble to the Act. The court noted how the legislature found that sexually violent predators do not have a mental illness that renders them appropriate for involuntary civil commitment pursuant to the existing Kansas involuntary civil commitment statute. The legislature stated that “sexually violent predators generally have antisocial personality features which are unamenable to existing mental illness treatment modalities.” *Kan. Stat. Ann.* § 59-29a01 (1995). The court then illogically concluded that by such language, “the legislature recognizes that sexually violent predators are not mentally ill but, rather, have an antisocial personality feature or a mental abnormality.” *Hendricks*, 912 P.2d at 129, 137. In making this statement, the court failed to recognize that the legislature did not state that sexually violent predators are not mentally ill; rather the legislature stated that sexually violent predators do not have a mental illness that renders them appropriate for involuntary civil commitment pursuant to the existing Kansas involuntary commitment statute. *Kan. Stat. Ann.* § 59-29a01 (1995). As will
In *Kansas v. Hendricks*, however, the United States Supreme Court overruled the Kansas Supreme Court and upheld the KSVP Act as constitutional.\footnote{47. *Kansas v. Hendricks*, 117 S.Ct. 2072 (1997).} The Court held that the KSVP Act comports with substantive due process because it requires a finding of both dangerousness and mental abnormality or personality disorder prior to commitment.\footnote{48. *Id.* at 2072-81.} The Court stated that the KSVP Act "requires a finding of future dangerousness, and then links that finding to the existence of a 'mental abnormality' or 'personality disorder' . . . ."\footnote{49. *Id.* at 2079-81.} Significantly, the Court rejected the Kansas Supreme Court's analysis and refused to hold that there was any "talismanic significance" to the term "mental illness."\footnote{50. *Id.* at 2080 (citing KAN. STAT. ANN. § 59-29a02(b)).} Instead, the Court held that a mental abnormality that makes a person likely to commit predatory acts of sexual violence, as narrowly defined by the KSVP Act, is sufficient for due process purposes.\footnote{51. *Id.* at 2079-81.} The following analysis provides an in-depth discussion of why such a holding by the United States Supreme Court comports with over a decade of civil commitment jurisprudence.

IV. **Argument**

A. **The KSVP Act Fully Comports with Substantive Due Process Requirements for Involuntary Indefinite Civil Commitment**

1. **The General Rule: Mental Illness and Dangerousness**

The Due Process Clause of the Fourteenth Amendment provides that "[n]o State shall . . . deprive any person of life, liberty, or property without the due process of law."\footnote{52. The Due Process Clause protects individuals from two kinds of government actions. Substantive due process "prevents the government from engaging in conduct that 'shocks the conscience' . . . or interferes with rights 'implicit in the concept of ordered liberty.'" United States v. Salerno, 481 U.S. 739, 746 (1987)(quoting Rochin v. California, 342 U.S. 165, 172 (1952) and Palko v. Connecticut, 302 U.S. 319, 325-26 (1937)). Procedural due process requires that when a government action that deprives an individual "of life, liberty or property" survives substantive due process, it still must be implemented in a}
commit an individual to a psychiatric hospital, in a civil proceeding, the general rule is that a state must prove by clear and convincing evidence that the individual is both mentally ill and dangerous.\textsuperscript{53} This rule evolved over time through United States Supreme Court case law.\textsuperscript{54}

In \textit{O'Connor v. Donaldson}, the United States Supreme Court first held that a person who is mentally ill has a "right to liberty," and that a state may not abridge this freedom by indefinitely locking up a person on the sole basis of his or her mental illness.\textsuperscript{55} \textit{O'Connor} established that, prior to commitment, a state must prove that an individual is not only mentally ill, but is likely to harm himself or others.\textsuperscript{56}

In \textit{Addington v. Texas}, the United States Supreme Court established the burden of proof necessary for civil commitment purposes.\textsuperscript{57} \textit{Addington} involved a challenge to a Texas law which permitted a state to commit persons to mental institutions based on clear and convincing evidence that the person was both mentally ill and dangerous.\textsuperscript{58} The Appellant argued that the State should be required to employ the beyond a reasonable doubt standard of proof.\textsuperscript{59} The Court rejected the mandate of the higher beyond a reasonable doubt standard but explained that states could adopt this standard if they desired.\textsuperscript{60} The Court then held that the fair manner. \textit{Id.} (quoting Matthews v. Eldridge, 424 U.S. 319, 335 (1976)). "Freedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action." Fouca v. Louisiana, 504 U.S. 71, 80 (1992) (citing Youngberg v. Romeo, 457 U.S. 307, 316 (1982)). "It is clear that commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection." Jones v. United States, 463 U.S. 354, 361 (1983).


\textsuperscript{55} O'Connor, 422 U.S. at 575.

\textsuperscript{56} Id. In O'Connor, respondent Donaldson was civilly committed to a mental hospital for fifteen years against his will after it was determined before a county judge that he was suffering from paranoid schizophrenia. \textit{Id.} The evidence from the trial showed that O'Connor, the hospital superintendent, had the power to release Donaldson if he thought Donaldson was not dangerous to himself or others, even if he remained mentally ill. \textit{Id.} Donaldson repeatedly asked O'Connor to release him but O'Connor arbitrarily refused. \textit{Id.} The evidence did not indicate that Donaldson posed any dangers either before or during his confinement. \textit{Id.} O'Connor's defense at trial was that he believed state law authorized "indefinite custodial confinement of the sick, even if they were not given treatment and their release could harm no one." \textit{Id.} at 564-71.

\textsuperscript{57} Addington v. Texas, 441 U.S. 418 (1979).

\textsuperscript{58} Id. at 421-22.

\textsuperscript{59} Id.

\textsuperscript{60} Id. The Court rejected the "beyond a reasonable doubt standard" because, in light of the uncertainties surrounding psychiatric diagnosis, it thought the state could never
constitutional threshold for civil commitment purposes is at least the clear and convincing standard.  

The United States Supreme Court, in *Foucha v. Louisiana*, applied the holdings of *O'Connor* and *Addington*. *Foucha* involved a challenge to a Louisiana law that allowed the state of Louisiana to automatically commit a criminal defendant found not guilty by reason of insanity to a mental institution. Under this law, Louisiana could continue to commit an insanity acquittee until he was able to prove that he was not dangerous, even if he regained his sanity.  

The Court struck down the Louisiana law as violative of the Due Process Clause. The Court held that to commit such a criminal defendant, the State must prove by clear and convincing evidence that the person is both mentally ill and dangerous. The Court noted that the "committed acquittee is entitled to release when he has recovered his sanity or is no meet this burden and that this would therefore "erect an unreasonable barrier to needed medical treatment." *Id.* at 432. The Court stated that "[g]iven the lack of certainty and the fallibility of psychiatric diagnosis, there is a serious question as to whether a state could ever prove beyond a reasonable doubt that an individual is both mentally ill and dangerous." *Id.* at 429. The Court emphasized that "[i]f a trained psychiatrist has difficulty with the categorical 'beyond a reasonable doubt' standard, the untrained lay juror — or indeed even a trained judge — who is required to rely on expert opinion could be forced by the criminal law standard of proof to reject commitment for many patients desperately in need of institutionalized psychiatric care." *Id.* at 430.  

61. *Id.* at 418. In adopting the clear and convincing standard of proof as the threshold minimum, the Court rejected the preponderance of the evidence standard. *Id.* The Court stated:

At one time or another every person exhibits some abnormal behavior which might be perceived by some as symptomatic of a mental or emotional disorder, but which is in fact within a range of conduct that is generally acceptable. Obviously, such behavior is no basis for compelled treatment and surely none for confinement. However, there is the possible risk that the factfinder might decide to commit an individual based solely on a few isolated instances of unusual conduct. Loss of liberty calls for a showing that the individual suffers from something more serious that is demonstrated by idiosyncratic behavior. Increasing the burden of proof is one way to impress the factfinder with the importance of the decision and thereby perhaps to reduce the chances that inappropriate commitments will be ordered.  

*Id.* at 426-27.  


63. *Id.*  

64. *Id.* at 73.  

65. *Id.* at 80.  

66. *Id.* at 75-76. The Court relied on *Addington v. Texas*, 441 U.S. 418 (1979), which held that to commit an individual to a mental facility the state must prove by clear and convincing evidence that the individual is mentally ill and that he must be hospitalized for his own welfare and for the protection of society. *Id.*
longer dangerous."\textsuperscript{67}

2. \textit{Kansas' Sexually Violent Predator Act}

The Kansas Sexually Violent Predator Act requires that, prior to commitment, the state must prove beyond a reasonable doubt that an individual is a sexually violent predator.\textsuperscript{68} The Act defines a sexually violent predator as "any person who has been convicted of or charged with a sexually violent offense who suffers from a mental abnormality or personality disorder which makes the person likely to engage in the predatory acts of sexual violence."\textsuperscript{69}

The KSVP Act fully comports with substantive due process requirements as established by \textit{O'Connor}, \textit{Addington} and \textit{Foucha}. First, the Act's standard of proof, beyond a reasonable doubt, meets the threshold level for standard of proof, clear and convincing evidence, as established in \textit{Addington}. Second, it is clear that the language of the Act requires a finding of dangerousness prior to commitment.\textsuperscript{70}

Finally, it is evident, that the term "mental abnormality," as defined in the KSVP Act, qualifies as a "mental illness" for due process purposes. The Court never has articulated a single definition of the term mental illness with regard to civil commitment laws and never has required states, in formulating their civil commitment laws, to specifically employ the term "mental illness." Moreover, mental health professionals claim that the term "mental illness" does not have any real clinical significance, as the term ultimately depends on the clinical diagnosis of a "mental disorder" and derives its meaning in this manner.

\textit{a. The United States Supreme Court Has Not Enunciated a Precise Constitutional Definition for "Mental Illness" Required for Civil Commitment Purposes}

In civil commitment cases, the United States Supreme Court has frequently used the term "mental illness" interchangeably with an array of

\textsuperscript{67} \textit{Foucha}, 504 U.S. at 77 (quoting Jones v. United States, 463 U.S. 354, 368 (1983) (emphasis added). \textit{Jones v. United States} held that "a verdict of not guilty by reason of insanity is sufficiently probative of mental illness and dangerousness to justify commitment of the acquitee . . . ." \textit{Id.} at 354. The court reasoned: (1) the fact that the defendant has been found, beyond a reasonable doubt, to have committed a criminal act indicates dangerousness, and (2) the fact that he committed the act because he is insane indicates that he is mentally ill. \textit{Id.} at 354-55.

\textsuperscript{68} \textit{KAN. STAT. ANN.} § 59-29a01 (1995).

\textsuperscript{69} \textit{See id.} § 59-29a02(a).

\textsuperscript{70} In re Care and Treatment of Hendricks, 912 P.2d 129, 133-38 (Kan. 1996).
other terms used to describe mental imbalances.\textsuperscript{71} For example, in \textit{Jones v. United States}, the Court held that the finding of "insanity" at a criminal trial was sufficiently probative of "mental illness" for involuntary civil commitment purposes.\textsuperscript{72} In \textit{Foucha}, the Court concluded that Foucha should not be involuntarily committed to a psychiatric hospital because he was not suffering from a "mental illness" or "mental disease."\textsuperscript{73} The Court, in \textit{Humphrey v. Cady}, reasoned that a "mental aberration" might amount to "mental illness" warranting civil commitment.\textsuperscript{74} Also, in \textit{Jackson v. Indiana}, the Court commented that the civil commitment of "feeble-minded" persons was not entirely inappropriate.\textsuperscript{75} Further, in \textit{Addington}, the Court discussed the State's interest in committing the "emotionally disturbed" and addressed the expanding problems society faces as a result of persons with "mental disorders."\textsuperscript{76}

Such frequent and interchangeable use by the Court demonstrates its unwillingness to issue a precise definition of the term "mental illness" for due process purposes.\textsuperscript{77} The Supreme Court has wisely refused to enunciate a precise definition, as a constitutional threshold, because it recognizes the evolving nature of psychology and psychiatry.\textsuperscript{78} As Justice Marshall wrote, in \textit{Powell v. Texas}, where the Court refused to articulate a constitutional test for insanity:

> [n]othing could be less fruitful than for this court to be impelled into defining some sort of insanity test in constitutional terms. . . . [To do so] would reduce, if not eliminate, that fruitful experimentation, and freeze the developing productive dialogue between the law and psychiatry into a rigid constitutional mold. \textit{It is simply not yet the time to write into the constitution formulas cast in terms whose meaning, let alone relevance, is not yet clear either to doctors or lawyers.}\textsuperscript{79}

Similarly, in his dissent in \textit{In re Care and Treatment of Hendricks}, Judge

\textsuperscript{72} \textit{Jones}, 463 U.S. at 354.
\textsuperscript{73} \textit{Foucha}, 504 U.S. at 80.
\textsuperscript{74} \textit{Humphrey}, 405 U.S. at 511.
\textsuperscript{75} \textit{Jackson}, 406 U.S. at 728 n.6.
\textsuperscript{76} \textit{Addington}, 441 U.S. at 425-26.
\textsuperscript{77} See \textit{In re Lineham}, 544 N.W.2d 308, 317-18 (Minn. 1996); \textit{State v. Post}, 541 N.W.2d 115, 123 (Wis. 1995); \textit{In re Young}, 857 P.2d 989 n.3 (Wash. 1993).
\textsuperscript{78} See \textit{In re Care and Treatment of Hendricks}, 912 P.2d 129, 149 (Kan. 1996); \textit{Powell v. Texas}, 392 U.S. 514, 536-37 (1968); \textit{Post}, 541 N.W.2d at 123.
\textsuperscript{79} \textit{Powell}, 392 U.S. at 536-37.
Larson wrote that "there is no justification for linking constitutional standards to the shifting sands of academic thought . . . ."\(^{80}\)

As a result, the Court has effectively ruled that the task of defining the "mental illness" required for involuntary confinement should be left to the state legislature, rather than the judiciary.\(^{81}\) State legislatures are in a better position to work in conjunction with the medical community to draft and update legislation that accurately reflects current medical knowledge. As Justice Powell stated, in *Jones*:

'The only certain thing that can be said about the present state of knowledge and therapy regarding mental disease is that science has not reached finality of judgment . . . .' The lesson we have drawn is not that government may not act in the face of this uncertainty but rather that courts should pay particular deference to reasonable legislative judgments.\(^{82}\)

In drafting civil commitment legislation, the United States Supreme Court has given state legislators broad powers.\(^{83}\) For example, in *Addington*, the Court held "[a]s the substantive standards for civil commitment may vary from state to state, procedures must be allowed to vary so long as they meet the constitutional minimum."\(^{84}\) The Court emphasized that "the essence of federalism is that states must be free to develop a variety of solutions to problems and not be forced into a common, uniform mold."\(^{85}\) Moreover, in *Jackson v. Indiana*, the Court commented on the traditionally broad power of the states with regard to civil commitment and noted that "the substantive limitations on the exercise of this power and the procedures for invoking it vary drastically among the [s]tates."\(^{86}\)

Therefore, not surprisingly, the United States Supreme Court has not required the states to specifically include the term "mental illness" in their civil commitment statutes.\(^{87}\) In *Allen v. Illinois*, for example, the Court upheld the Illinois Sexually Dangerous Persons Act as constitutional, despite the fact that the Act did not contain the term "mental ill-

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80. *In re Care and Treatment of Hendricks*, 912 P.2d at 149.


82. *Id.* at 366 n.13 (quoting *Greenwood v. United States*, 350 U.S. 366 (1956)).


84. *Addington*, 441 U.S. at 431.

85. *Id.*


ness." This Act committed sexually dangerous persons who suffered from "a mental disorder . . . coupled with criminal propensities to the commission of sex offenses, and who have demonstrated propensities toward acts of sexual assault or . . . sexual molestation of children."

Thus, in *Kansas v. Hendricks*, clearly the United States Supreme Court did not offend traditional notions of due process in upholding the KSVP Act despite the fact that the Kansas legislature opted not to employ the term "mental illness." Clearly, no constitutional significance adheres to this term, and the term "mental abnormality," as narrowly defined by the KSVP Act, equally satisfies due process. Moreover, in upholding the KSVP Act on substantive due process grounds, the Court wisely deferred to the principles of federalism, and, specifically, to the Kansas legislature, who, at the guidance of mental health professionals, *narrowly* defined mental abnormality as persons who are predisposed to commit predatory acts of sexual violence.

### b. According to Mental Health Professionals the Term "Mental Abnormality," As Defined in the KSVP Act, Is Interchangeable with the Term "Mental Illness"

Qualified mental health professionals determine whether an individual suffers from a "mental illness" for purposes of state involuntary civil commitment laws in a two-step process:

First, an individual must be diagnosed by a qualified mental health professional as having a specific disorder defined in the DSM-IV or otherwise generally accepted in the field. Second, the professional must determine whether the disorder is of a type and severity that would warrant commitment to a psychiat-

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89. *Id.* at 364 n.1.
91. The DSM-IV defines "mental disorder" as a:
   clinically significant behavioral or psychological syndrome or pattern that occurs in an individual that is associated with present distress (painful symptoms) or disability (the impairment in one or more important areas of functioning) or with significantly increased risk of suffering death, pain or disability or important loss of freedom. *American Medical Association, Diagnostic and Statistical Manual of Mental Disorders* at xxi (4th ed. 1994).
Kansas v. Hendricks

ric: hospital.92

Similarly, qualified mental health professionals would determine that a person suffers from a “mental abnormality,” as defined by the KSVP Act, by using the exact same two-step process: “[f]irst, the clinician determines whether the individual suffers from a mental disorder . . . . The second step of the process is to determine whether the disorder is of the type and severity to merit civil commitment . . . .”93

Thus, irrespective of whether the KSVP Act employs the term “mental illness” or “mental abnormality,” the threshold question for mental health analysis becomes whether or not the individual suffers from a “mental disorder.” The fact that the threshold question pertains to “mental disorder” and not “mental illness” is not surprising in light of the fact that the DSM-IV includes no reference whatsoever to the term “mental illness.”94 Moreover, it is also not surprising in light of the fact that the Longman Dictionary of Psychology and Psychiatry defines “mental illness” as a “mental disorder.”95

c. The Term “Mental Abnormality,” As Defined by the KSVP Act, Has Clinical Meaning to Mental Health Professionals

The Kansas Sexually Violent Predator Act defines mental abnormality as “a congenital or acquired condition affecting the emotional or volitional capacity which predisposes the person to commit sexually violent offenses in a degree constituting such person a menace to the health and safety of others.”96

Mental health experts, under the first step discussed above, understand this definition to encompass “certain severe forms of paraphilia,” that are

92. See Brief of the Association for the Treatment of Sexual Abusers (“ATSA”) Amicus Curiae in Support of Petitioner, at 4-5, In re Care and Treatment of Hendricks, 912 P.2d 129, 149 (Kan. 1996). ATSA is a non-profit international organization consisting of over 1,100 professionals who specialize in the research, treatment, assessment and supervision of sexual abusers. ATSA’s membership is drawn from all 50 states and 9 foreign countries. The membership includes the most prominent clinicians and researchers in the field. Clinical membership requires an advanced degree in a recognized mental health profession plus 2,000 additional hours of experience in evaluating and treating sexual offenders . . . .

93. Id. at 6-8.
96. KAN. STAT. ANN. § 59-29a02(b) (1995).
sexual disorders defined in the DSM-IV.97 “The disorders are characterized by recurrent, intense, sexually-arousing fantasies, sexual urges, or behaviors generally involving: (1) non-human subjects; (2) the suffering of humiliation of oneself or one's partner; or (3) children or other non-consenting persons.” Moreover, for a person to be diagnosed with paraphilia, “the fantasies, urges and behaviors must occur over a period of at least six months.”99 The diagnostic criteria “eliminates occasional, or situational offenders, and ensures the presence of a chronic condition.”100 Consequently, paraphilia does not include “unusual sexual behaviors due to mental retardation, dementia, personality change due to a general medical condition, substance intoxication, a manic episode, or schizophrenia.”101

Under the second step of the aforementioned process, mental health experts “determine whether the disorder is of the type and severity to merit civil commitment as a sexually violent predator.”102 The sexual disorder of paraphilia “can be characterized as mild, moderate or severe depending on the number of symptoms present and the degree to which those symptoms impair social functioning.”103 Because the KSVP Act defines a “sexually violent predator” as a person who has been convicted or charged with a sexually violent offense and who suffers from mental abnormality, which makes the person likely to engage in predatory acts of sexual violence, the psychiatric diagnosis will “in practice always involve moderate or more often, severe forms of paraphilia.”104

Thus, the term “mental abnormality,” as defined in the context of the KSVP Act, has a clear meaning to mental health professionals and is not vague or conclusory. The Kansas Supreme Court holding that the term “mental abnormality” does not have clinical significance and cannot be used in formal diagnosis was therefore misguided.105 Moreover, the Kansas Supreme Court holding that the KSVP Act allows the commitment of persons not mentally ill was also misguided. As illustrated above, the

98. Id. (citing AMERICAN PSYCHIATRIC ASSOCIATION, ASSOCIATION DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 522-23 (4th ed. 1994)).
99. Id. at 6.
100. Id.
101. Id.
102. Id. at 8.
103. Id.
104. Id.
United States Supreme Court, in *Kansas v. Hendricks*, rightfully overruled the holding by the Kansas Supreme Court, holding that there is no constitutional or clinical significance to the term "mental illness." Furthermore, it held that the term "mental abnormality," as defined in the KSVP Act, satisfies the substantive due process requirements of *O'Connor, Addington*, and *Foucha*.106

**B. The KSVP Act Does Not Fall Within the Ambit of the Due Process Clause Exception**

1. The Due Process Clause Exception: Mere Dangerousness

To involuntarily commit an individual to a psychiatric hospital, Substantive due process requires that a state prove by clear and convincing evidence that the individual is both mentally ill and dangerous.107 The United State Supreme Court, however, has enunciated an exception to this general rule: "in certain narrow circumstances persons who pose a danger to others or to the community may be subject to limited confinement . . . ."108

Significantly, this exception requires no proof of mental illness.109 Involuntary confinement, which must be limited in duration, is based on dangerousness alone.110 Such an exception reflects the Court's philosophy that the government has the power to require dangerous individuals to sacrifice their liberty interest for the safety of the common good.111

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106. *Id.* The claim that the term "mental abnormality" is not satisfactory for due process purposes because it is not a psychiatric or medical term, but, rather, a legal term, defined in an Act, is misguided as well. The fact that a term is legal rather than medical is no bar to holding the Act constitutional. Psychologists and psychiatrists consistently have been asked to diagnose an individual as "insane" or "competent," or as suffering from a "mental disease or defect or mental illness." Such terms are legal, not medical. See, e.g. United States v. McDonald, 312 F.2d 847, 850-51 (D.C. Cir. 1962) ("What psychiatrists may consider a 'mental disease or defect' for clinical purposes . . . .may or may not be the same as mental disease or defect for the jury's purpose of determining criminal responsibility."); United States v. Freeman, 357 F.2d 606, 622 (2d Cir. 1966) ("[A] test [for 'mental disease' in a criminal proceeding] which permits all to stand or fall upon the labels or classifications employed by testifying psychiatrists hardly affords the court the opportunity to perform its function of rendering an independent legal and social judgment.").


110. See *Foucha*, 504 U.S. at 80; *Salerno*, 481 U.S. at 748-49; *Schall*, 467 U.S. at 263-81.

the Court explained in *Jacobson v. Massachusetts*:

the liberty secured by the Constitution of the United States to every person within its jurisdiction does not import an absolute right in each person to be, at all times and in all circumstances, wholly free from restraint. There are manifold restraints to which every person is necessarily subject for the common good. On any other basis organized society could not exist.\(^{112}\)

The United States Supreme Court has addressed involuntary confinement on the mere basis of dangerousness in an array of cases, including *Foucha v. Louisiana,\(^{113}\) United States v. Salerno,\(^{114}\) and *Schall v. Martin.*\(^{115}\)

In *Foucha,* as discussed above, a defendant challenged a law that allowed Louisiana to civilly commit insanity acquitees until they were able to prove that they were not dangerous, even if they regained their sanity.\(^{116}\) Thus, the Court considered whether the commitment of insanity acquitees on the mere basis of dangerousness comported with substantive due process.\(^{117}\)

In arriving at its holding, the Court cited *U.S. v. Salerno* where defendants who were being detained prior to trial, pursuant to a Bail Reform Act, challenged the constitutionality of their detention, claiming it violated their rights to substantive due process.\(^{118}\) Under the Act, courts were required to "detain prior to trial arrestees charged with certain serious felonies if the Government demonstrates by clear and convincing evidence after an adversary hearing that no release conditions will reasonably assure . . . the safety of any other person and the community."\(^{119}\)

The Court, in *Salerno,* upheld the Bail Reform Act as constitutional because it was narrowly tailored to serve the State’s legitimate and compelling interest\(^{120}\) and to protect against unnecessary and erroneous dep-

\(^{112}\) *Id.*

\(^{113}\) *Foucha,* 504 U.S. at 71.

\(^{114}\) *Salerno,* 481 U.S. at 739.

\(^{115}\) *Schall,* 467 U.S. at 253.

\(^{116}\) *Foucha,* 504 U.S. at 73.

\(^{117}\) *Id.* at 73.

\(^{118}\) *Id.* at 80-81 (citing *Salerno,* 481 U.S. at 739).

\(^{119}\) *Id.* at 739 (quoting 18 U.S.C. § 3142(e)(Supp.III 1982)).

\(^{120}\) *Id.* at 749 (citing De Veau v. Braisted, 363 U.S. 144, 155 (1960)). The Court held that the government's interest in preventing arrestees from committing crime was both legitimate and compelling. *Id.* In upholding the Act, the Court said: "[w]e have repeatedly held that the Government's regulatory interest in community safety can, in appropriate circumstances, outweigh an individual's liberty interest." *Id.* at 748.
rivations of liberty: 1) the Act operated only on individuals who were arrested for "a specific category of extremely serious offenses;"121 2) the government needed probable cause to detain the arrestee who committed the charged crime;122 3) the government, in a rather extensive adversary hearing, needed to "convince a neutral decision maker by clear and convincing evidence that no conditions of release reasonably can assure the safety of the community;"123 4) the arrestee was entitled to a prompt adversary hearing,124 and; 5) the maximum length of the pretrial detention was limited in duration.125 The Court in Foucha then held that "Salerno does not save Louisiana's detention of insanity acquitees who are no longer mentally ill. Unlike the sharply focused scheme at issue in Salerno, the Louisiana scheme of confinement is not carefully limited."126 The Court emphasized that, in Foucha, the criminal defendant was not entitled to an adversary hearing where the state had to prove by clear and convincing evidence that he was demonstrably dangerous to the community.127 Conversely, the state needed to prove nothing; the burden was on the criminal defendant to prove that he was not dangerous.128 Also, the detention of the criminal defendant was not limited strictly in duration.129 The Louisiana law allowed the state to hold any criminal defendant for an indefinite period.130 Consequently, the Court concluded that the Louisiana law did not fall within the carefully limited exception permitted by the Due Process Clause.131

In Foucha, Justice O'Connor's concurring opinion is particularly noteworthy.132 She emphasized that the majority's opinion addressed only the statutory scheme that broadly permitted the involuntary confinement of insanity acquitees after they regained their sanity.133 She emphasized the Foucha case did not pass judgment on more narrowly drawn statutes.134 Thus, Justice O'Connor explained, "[i]t might therefore be possi-

121. Id. at 750 (citing 18 U.S.C § 3142(f)).
122. Id. at 750.
123. Id. (citing 18 U.S.C. § 3142(f)).
124. Id. at 747.
125. Id.
127. Id.
128. Id. at 81-82.
129. Id. at 82-83.
130. Id. at 83.
131. Id.
133. Id. at 86-87 (O'Connor, J., concurring).
134. Id. at 87 (O'Connor, J., concurring).
ble for Louisiana to confine an insanity acquitee who has regained sanity if, unlike the situation in this case, the nature and duration of detention were tailored to reflect pressing public safety concerns related to the acquitees continuing dangerousness.\textsuperscript{135} As in Foucha and Salerno, in Schall v. Martin, the United States Supreme Court also considered circumstances in which involuntary commitment may be based merely on dangerousness.\textsuperscript{136} In Schall, defendants, who were detained under the New York Family Court Act, claimed that the pre-trial detention permitted under the Act violated their substantive due process rights.\textsuperscript{137} The New York Family Court Act authorized "pretrial detention of an accused juvenile delinquent based on a finding that there is a serious risk that the child may 'before the return date commit an act which if committed by an adult could constitute a crime.'"\textsuperscript{138}

The Court stated that two separate inquiries must be made to determine if the civil commitment law is "compatible with the fundamental fairness" required by the Due Process Clause. These inquiries include: 1) whether the preventative detention serves a legitimate state interest; and, 2) whether adequate procedural safeguards are established to prevent erroneous and unnecessary deprivations of liberty.\textsuperscript{139}

\textsuperscript{135} Id. at 87-88 (O'Connor, J., concurring) (citing U.S. v. Salerno, 481 U.S. 739, 747-51 (1987); Schall v. Martin, 467 U.S. 253, 264-71 (1984); Jackson v. Indiana, 406 U.S. 715, 738 (1972)). Jackson is significant to United States Supreme Court civil commitment jurisprudence because it held that "[a]t the least, due process requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed." Id.

In Jackson, the defendant, Jackson, was civilly committed for three and one half years because he was incompetent to stand trial. Jackson had a mental I.Q. of a pre-school child. Id. An Indiana statute allowed a judge to indefinitely commit to a mental institution a person who was incompetent to stand trial until he regained such capacity. Id. The problem in this case was that Jackson was a mentally defective deaf mute; he had a mental capacity of a pre-school child and probably would never regain competency. Id. The United States Supreme Court held that the indefinite confinement of a criminal defendant solely on account of his incompetency to stand trial was violative of due process. Id. at 718. The Court emphasized that the Indiana statute did not provide adequate commitment procedures. Id. For example, Jackson was not afforded formal commitment proceedings: (1) addressed to society's interest in his restraint; or (2) addressed to the ability of the state to assist him in obtaining competency through custodial care; or (3) addressed to his ability to function in society. Id. Thus, the Court held that the nature and duration of commitment did not bear some reasonable relation to the purpose for which he was committed and that his commitment, therefore, violated substantive due process. Id.


\textsuperscript{137} Id.

\textsuperscript{138} Id. at 255 (quoting New York Jud. Law § 320.5 (McKinney 1983)).

\textsuperscript{139} Id. at 263-64 (1984); see also Bell v. Wolfish, 441 U.S. 520, 534 n.15; Matthews v. Eldridge, 424 U.S. 319, 335 (1976).
The Court held that the New York Family Court Act did serve a legitimate and compelling state interest in “protecting the community from crime.”\(^{140}\) Crime prevention, it held, is “a weighty social objective.”\(^{141}\) The Court emphasized that the state had legitimate *parens patriae* interest in promoting and preserving child welfare and in preventing juveniles from committing crimes.\(^{142}\)

The Court also held that the procedures provided by the New York Family Court Act did provide sufficient protections against erroneous and unnecessary deprivations of liberty.\(^{143}\) The Court commented on the following necessary procedures under the Act: 1) the juvenile was entitled to an initial, stenographically recorded, hearing where the juvenile was given full notice of the charges against him; 2) the juvenile had to be informed of his rights to remain silent and his right to be represented by counsel; 3) the juvenile was entitled to a formal, adversarial probable-cause hearing no more than three days after the initial appearance hearing; 4) the burden at the adversarial hearing was on the agency to call witnesses and offer evidence in support of the charges; 5) the accused juvenile had a right to call witnesses and offer evidence on his own behalf; and 6) the court needed to find probable cause to continue to detain the juvenile.\(^{144}\)

2. The KSVP Act Does Not Fall Within the Ambit of the Due Process Clause Exception

*Salerno* and *Schall* both held that to pass constitutional muster and to adequately fall within the ambit of the Due Process Clause exception, the Act must satisfy two constitutional thresholds. First, the Act must serve the state’s legitimate and compelling interest. Second, the Act must be narrowly focused on “a particularly acute problem in which the govern-

\(^{140}\) *Schall*, 467 U.S. at 264 (citing *De Veau v. Braisted*, 363 U.S. 144, 155 (1960)); See also *Terry v. Ohio*, 392 U.S. 1, 22 (1968).

\(^{141}\) *Schall*, 467 U.S. at 264 (quoting *Brown v. Texas*, 443 U.S. 47, 52 (1979)).

\(^{142}\) Id. at 265 (citations omitted). Significantly, the Court in *Schall* specifically rejected the contention “that it is impossible to predict future [dangerous] behavior” and that such predictions are “so vague as to be meaningless.” Id. at 279 (quoting *Jurek v. Texas*, 428 U.S. 262, 274 (1976)). The Court recognized “that a prediction of future [dangerous] criminal conduct is an experienced prediction based on a host of variables which cannot be readily codified.” Id. at 279 (quoting *Greenholtz v. Nebraska Penal Inmates*, 442 U.S. 1, 16 (1979)).

\(^{143}\) *Schall*, 467 U.S. at 277. Specifically, the Court stated that these procedures “have been found constitutionally adequate under the Fourth Amendment.” Id. (citing *Kent v. United States*, 383 U.S. 541, 557 (1966)).

\(^{144}\) Id. at 274-77.
ment's interests are overwhelming."{145}

The KSVP Act that was at issue in *Kansas v. Hendricks* clearly satisfies the first of these constitutional thresholds. As the Court has already held in both *Salerno* and *Schall*, the state has a legitimate and compelling interest in preventing crime.{146} The KSVP Act specifically was designed to combat public safety problems caused by recidivist sexual offenders.{147} This is evident from the preamble to the KSVP Act which refers to a "small but extremely dangerous group of sexually violent predators" who generally have "antisocial personality features" that render them highly likely to engage in repeat sexually violent behavior.{148} Moreover, the preamble of the Act declared that the existing involuntary commitment procedures were inadequate to address the risks posed by these sexually violent predators.{149} Consequently, the KSVP Act was enacted in an express attempt to combat this problem and to protect the community from the violent sexual crimes committed by repeat violent sexual offenders.

The more difficult question is whether the KSVP Act satisfies the second constitutional threshold as established in *Salerno*, *Schall* and *Foucha*.{150} Is the KSVP Act narrowly focused to serve the state's legitimate and compelling interest in combating repeat sexually violent crime and does the Act provide sufficient protections against erroneous and unnecessary deprivations of liberty?{151}

Significantly, the procedural protection provided by the KSVP Act is very similar to the protection provided in *Salerno*: 1) the KSVP Act operates only on individuals who are arrested for a specific category of ex-

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145. United States v. Salerno, 481 U.S. 739, 749-50 (1987); Schall, 467 U.S. at 263-64 (1984). *Salerno* also established that the state must meet the intermediate burden of clear and convincing evidence to civilly confine an arrestee who is deemed dangerous and not mentally ill. *Salerno*, 481 U.S. at 739. It is clear that the KSVP Act meets this burden because, under the Act, the state must prove beyond a reasonable doubt that a person is dangerous and likely to commit predatory acts of sexual violence. KAN. STAT. ANN. § 59-29a01. See also In re Care and Treatment of Hendricks, 912 P.2d 129, 133-38 (Kan. 1996).

146. *Salerno*, 481 U.S. at 749 (citing De Veau v. Braisted, 363 U.S. 144, 155 (1960)); *Schall*, 467 U.S. at 264 (quoting Brown v. Texas, 443 U.S. 47, 52 (1979)); see In re Young, 857 P.2d 989, 1000 (Wash. 1993) ("it is irrefutable that the State has a compelling interest both in treating sex predators and protecting society from their actions."). *Id.*

147. In re Care and Treatment of Hendricks, 912 P.2d at 131-32.


149. *Id.*

150. Foucha v. Louisiana, 504 U.S. 71, 80-81 (1992); Salerno, 481 U.S. at 750; Schall, 467 U.S. at 264.

tremely serious offenses;\textsuperscript{152} 2) the court must have probable cause before commitment proceedings can proceed;\textsuperscript{153} 3) the state must prove beyond a reasonable doubt that the person is a sexually violent predator;\textsuperscript{154} 4) persons subject to the proceedings of the KSVP Act are entitled to a trial within sixty days after the filing of the petition, to determine whether the person is a sexually violent predator;\textsuperscript{155} and 5) persons subject to the Act have a right to counsel, a right to a jury trial, and a right to be examined by their own mental health professional.\textsuperscript{156}

There is, however, one significant distinction between the procedural protection provided in \textit{Salerno} and \textit{Schall} and that afforded by the KSVP Act. The Acts at issue in \textit{Salerno} and \textit{Schall} merely detained persons awaiting trial, whereas, the KSVP Act appears to detain persons for a longer period of time.\textsuperscript{157} The Court in \textit{Foucha}, however, implied that an insane person may be confined to a mental institution based on dangerousness alone, even if he regains sanity, if the nature and duration of the detention is sufficiently narrowly tailored.\textsuperscript{158}

Thus, the crux of whether the KSVP Act can be upheld under the Due Process Clause exception appears to depend upon whether confinement under the Act is limited in duration.\textsuperscript{159} Several of the amicus briefs that were filed before the Court in Kansas \textit{v. Hendricks} urged that the KSVP Act comports with the Due Process Clause exception because the duration of the commitment under the Act is limited: the Act requires all committed persons to be re-evaluated on an annual basis, and, if the state desires to continue commitment for more than one year, the district judge needs to conclude that no probable cause exists to believe that the person is safe to be released into the community, or the factfinder must again determine that the person is a sexually violent offender beyond a reasonable doubt.\textsuperscript{160}

\textsuperscript{152} Specifically, the Act pertains only to those individuals who satisfy the definition of "sexually violent predator" under § 59-29a02. \textit{Kan. Stat. Ann.} § 59-29a02 (1995).

\textsuperscript{153} \textit{See id.} § 59-29a05.

\textsuperscript{154} \textit{See id.} § 59-29a07(a).

\textsuperscript{155} \textit{See id.} § 59-29a06.

\textsuperscript{156} \textit{Id.}


\textsuperscript{159} \textit{See Foucha}, 504 U.S. at 80; \textit{Salerno}, 481 U.S. at 739.

The KSVP Act does not fall within the ambit of the Due Process Clause exception because although the nature of the commitment is sufficiently narrow, as in Salerno and Schall, the duration of the commitment is not sufficiently narrow as required by Foucha. This is due to the fact that commitment under the Act is for an unlimited duration, or, alternatively, that commitment under the Act is not clearly limited in duration. Under the Act, a person will not be released from civil commitment unless the district judge concludes that there is probable cause that the person can safely be released into the community.\textsuperscript{161} Since, such a release is dependent on affirmative action by the district judge, confinement under the Act is not clearly limited in duration.\textsuperscript{162} The United States Supreme Court, in Kansas v. Hendricks, was not forced to decide the issue of whether the KSVP Act fell within the ambit of the Due Process Clause exception because it upheld the Act under the general due process rule, namely, that the Act required a finding of both dangerousness and mental abnormality.\textsuperscript{163} The Court would have been faced with this issue if the Court had determined that "mental abnormality" did not suffice as the "mental illness" required for due process purposes.

Even though the Court did not address this issue, the Court did state that involuntary civil confinement of a limited subclass of dangerous persons is not contrary to our understanding of ordered liberty.\textsuperscript{164} The Court also stated that "certain narrow circumstances provided for the forcible civil detention of people who are unable to control their behavior and who thereby pose a danger to the public health and safety."\textsuperscript{165} But

\textsuperscript{161} KAN. STAT. ANN. § 59-29a08 (1995).
\textsuperscript{162} As one commentator noted concerning sexual predator laws such as the KSVP Act:
the requirement that a judge or jury must decide beyond a reasonable doubt that a person fits the definition, is for those with any experience in the jury system, laughable. What happens is that a person is convicted of an offense, given the maximum time allowed by law, and after serving the sentence, someone in a position of authority decides that was not enough time, and off one goes to the mental institution for treatment of their abnormality. For how long? As long as we decide to keep you there.


\textsuperscript{163} The Court stated "[w]e have sustained civil commitment statutes when they have coupled proof of dangerousness with the proof of some additional factor such as a 'mental illness' or 'mental abnormality.'" Kansas v. Hendricks, 117 S.Ct. 2072, 2080 (1997) (citing Heller v. Doe, 503 U.S. 312, 323 (1993) (discussing Kentucky statute permitting commitment of dangerous "mentally retarded" or "mentally ill" individuals)).

\textsuperscript{164} Hendricks, 117 S.Ct. at 2080.
\textsuperscript{165} Id. at 2079.
the Court then stated that "[a] finding of dangerousness, standing alone, is ordinarily not a sufficient ground upon which to justify indefinite involuntary commitment." The Court did not elaborate on when such a circumstance might arise that would permit indefinite involuntary civil commitment based merely on dangerousness.

V. Conclusion

The United States Supreme Court case, *Kansas v. Hendricks*, is significant because states now have the authority to involuntary and indefinitely commit sexually violent predators to mental hospitals after they serve their prison sentence. Moreover, the Court confirmed the traditionally broad power the states have in defining the mental illness necessary for civil commitment comporting with due process and in defining "terms of medical nature that have legal significance." 

166. *Id. at 2080.*

167. Howard Zonana, in his article, *The Civil Commitment of Sex Offenders*, comments on the impact *Kansas v. Hendricks* will have on the cost of treatment for sex offenders. He states:

[t]reatment for this group requires maximum security treatment facilities and cannot be accomplished in the usual hospital settings. Annual cost estimates range from $60,000 to $130,000 per patient. These do not include the costs for the commitment proceedings (attorneys and experts) or for any needed construction of facilities. It is three or four times more expensive to provide hospitalization than to give longer prison sentences.


168. Since the United States Supreme Court rendered its opinion in *Kansas v. Hendricks*, there are at least "[s]even states that have sexually violent predator laws, and 30 others that are considering them. New Jersey, Washington, Arizona, California, Kansas, Minnesota, and Wisconsin have laws that allow sex offenders to be held in mental institutions after they finish their prison sentence." Tom Bromwell, *Close to Home — A Stronger Megan's Law*, WASH. POST, Sept. 28, 1997, at C08. Moreover, since *Kansas v. Hendricks*, the New York Senate passed a bill allowing for the commitment of sexually violent predators subsequent to the service of prison sentences. Cecil Connolly, *Some States Racing to Grasp Baton of Power Passed by High Court*, WASH. POST, June 29, 1997, at A16. See also Tom Bromwell, *Close to Home — A Stronger Megan’s Law*, WASH. POST, Sept. 28, 1997, at C08 (“During the 1998 General Assembly session, I will sponsor legislation to expand Maryland’s Megan’s Law to provide that sex offenders, who are at risk of committing repeated sex crimes, can be confined indefinitely in a mental institution after they have served their prison sentence.”). See also Tony Lang, *Longer Lock-Up For Sex Predators*, CINCINNATI ENQUIRER, June 27, 1997, at A18 (stating “Ohio, Kentucky and Indiana lawmakers ought to pounce on this week’s Supreme Court ruling in *Kansas v. Hendricks* and enact their own violent sexual predator laws.”).

169. *See Hendricks*, 117 S.Ct. at 2081 (noting that “[i]Indeed we have never required State legislatures to adopt any particular nomenclature in drafting civil commitment statutes. Rather, we have traditionally left to the legislators the task of defining terms of
medical nature that have legal significance.”). Some commentators state that cases such as Hendricks demonstrate that “the nation is witnessing a dramatic retreat from the strong federalism begun during the Depression and lasting well into the 1980s.” Cecil Connolly, Some States Racing to Grasp Baton of Power Passed by High Court, WASH. POST, June 29, 1997, at A16. See also Joan Biskupic, Court Gives States Leeway in Confining Sex Offenders, WASH. POST, June 24, 1997, at A01 (“[Kansas v. Hendricks] . . . gives legislators significant new leeway to extend the confinement of such convicts.”).