AMERICAN CONSTITUTIONALISM

VOLUME II: RIGHTS AND LIBERTIES

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Supplementary Material

Chapter 11: The Contemporary Era – Individual Rights/Personal Freedom and Public Morality

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

*In 1994, Kansas adopted the Sexually Violent Predator Act, which like many statutes being adopted at the time established a process of civil commitment for those deemed likely to engage in “predatory acts of sexual violence” due to “mental abnormality.” In order to involuntarily commitment someone under the act, a professional evaluation of the individual would have to be conducted and a trial would have to be held that would determine beyond a reasonable doubt that the individual was a sexually violent predator. If such a determination was made, the individual would be given to the custody of the state secretary of social and rehabilitation services for control, care and treatment until such a time as the individual “is safe to be at large.”*

*Leroy Hendricks was the first person to be subjected to the new procedure. He was at the time an inmate in state prison with a lengthy record of sexual molestation of children, but he was due to be released from prison to a halfway house. After a jury trial, he was determined to be a sexually violent predator. Hendricks challenged his new involuntary civil commitment under the act in state court. The Kansas state supreme court struck down the law as a violation of his federal constitutional rights. The state appealed to the U.S. Supreme Court, which in a 5-4 decision reversed the state court and upheld the civil commitment statute as consistent with the federal Constitution.*

JUSTICE THOMAS, delivered the opinion of the Court.

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Kansas argues that the Act's definition of "mental abnormality" satisfies "substantive" due process requirements. We agree. Although freedom from physical restraint "has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action," *Fouche v. Louisiana* (1992), that liberty interest is not absolute. The Court has recognized that an individual's constitutionally protected interest in avoiding physical restraint may be overridden even in the civil context:

"[T]he 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 with safety to its members." *Jacobsohn v. Massachusetts* (1905).

Accordingly, States have in certain narrow circumstances provided for the forcible civil detainment of people who are unable to control their behavior and who thereby pose a danger to the public health and safety. We have consistently upheld such involuntary commitment statutes provided the confinement takes place pursuant to proper procedures and evidentiary standards. It thus cannot be said that the involuntary civil confinement of a limited subclass of dangerous persons is contrary to our understanding of ordered liberty.

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A finding of dangerousness, standing alone, is ordinarily not a sufficient ground upon which to justify indefinite involuntary commitment. We 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." . . . These added statutory requirements serve to limit involuntary civil confinement to those who suffer from a volitional impairment rendering them dangerous beyond their control. The Kansas Act is plainly of a kind with these other civil commitment statutes. . . .

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Indeed, we have never required state legislatures to adopt any particular nomenclature in drafting civil commitment statutes. Rather, we have traditionally left to legislators the task of defining terms of a medical nature that have legal significance. . . . As a consequence, the States have, over the years, developed numerous specialized terms to define mental health concepts. Often, those definitions do not fit precisely with the definitions employed by the medical community. . . .

To the extent that the civil commitment statutes we have considered set forth criteria relating to an individual's inability to control his dangerousness, the Kansas Act sets forth comparable criteria and Hendricks' condition doubtless satisfies those criteria. . . .

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As a threshold matter, commitment under the Act does not implicate either of the two primary objectives of criminal punishment: retribution or deterrence. The Act's purpose is not retributive because it does not affix culpability for prior criminal conduct. Instead, such conduct issued solely for evidentiary purposes, either to demonstrate that a "mental abnormality" exists or to support a finding of future dangerousness. . . .

Moreover, unlike a criminal statute, no finding of scienter is required to commit an individual who is found to be a sexually violent predator; instead, the commitment determination is made based on a "mental abnormality" or "personality disorder" rather than on one's criminal intent. . . .

Nor can it be said that the legislature intended the Act to function as a deterrent. Those persons committed under the Act are, by definition, suffering from a "mental abnormality" or a "personality disorder" that prevents them from exercising adequate control over their behavior. Such persons are therefore unlikely to be deterred by the threat of confinement. And the conditions surrounding that confinement do not suggest a punitive purpose on the State's part. The State has represented that an individual confined under the Act is not subject to the more restrictive conditions placed on state prisoners, but instead experiences essentially the same conditions as any involuntarily committed patient in the state mental institution. . . .

. . . . The State may take measures to restrict the freedom of the dangerously mentally ill. This is a legitimate nonpunitive governmental objective and has been historically so regarded. . . .

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. . . . We have already observed that, under the appropriate circumstances and when accompanied by proper procedures, incapacitation may be a legitimate end of the civil law. *United States v. Salerno* (1987). . . . [W]e have never held that the Constitution prevents a State from civilly detaining those for whom no treatment is available, but who nevertheless pose a danger to others. A State could hardly be seen as furthering a "punitive" purpose by involuntarily confining persons afflicted with an untreatable, highly contagious disease. *Compagnie Francaise de Navigation a Vapeur v. Louisiana Board of Health* (1902). Similarly, it would be of little value to require treatment as a precondition for civil confinement of the dangerously insane when no acceptable treatment existed. To conclude otherwise would obligate a State to release certain confined individuals who were both mentally ill and dangerous simply because they could not be successfully treated for their afflictions. *Greenwood v. United States* (1956). . . .

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*Reversed*.

JUSTICE KENNEDY, concurring.

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. . . . As all Members of the Court seem to agree, then, the power of the State to confine persons who, by reason of a mental disease or mental abnormality, constitute a real, continuing, and serious danger to society is well established. *Addington v. Texas* (1979). Confinement of such individuals is permitted even if it is pursuant to a statute enacted after the crime has been committed and the offender has begun serving, or has all but completed serving, a penal sentence, provided there is no object or purpose to punish. . . . The Kansas law, with its attendant protections, including yearly review and review at any time at the instance of the person confined, is within this pattern and tradition of civil confinement. . . .

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On the record before us, the Kansas civil statute conforms to our precedents. If, however, civil confinement were to become a mechanism for retribution or general deterrence, or if it were shown that mental abnormality is too imprecise a category to offer a solid basis for concluding that civil detention is justified, our precedents would not suffice to validate it.

JUSTICE BREYER, with whom JUSTICE STEVENS, JUSTICE SOUTER, and JUSTICE GINSBURG join, dissenting.

I agree with the majority that the Kansas Sexually Violent Predator Act's "definition of `mental abnormality' " satisfies the "substantive" requirements of the Due Process Clause. Kansas, however, concedes that Hendricks' condition is treatable; yet the Act did not provide Hendricks (or others like him) with any treatment until after his release date from prison and only inadequate treatment thereafter. These, and certain other, special features of the Act convince me that it was not simply an effort to commit Hendricks civilly, but rather an effort to inflict further punishment upon him. The Ex Post Facto Clause therefore prohibits the Act's application to Hendricks, who committed his crimes prior to its enactment.

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This case does not require us to consider whether the Due Process Clause *always* requires treatment—whether, for example, it would forbid civil confinement of an *untreatable* mentally ill, dangerous person. To the contrary, Kansas argues that pedophilia is an "abnormality" or "illness" that can be treated. . . .

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Kansas' 1994 Act violates the Federal Constitution's prohibition of "any . . . *ex post facto* Law" if it "inflicts" upon Hendricks "a greater punishment" than did the law "annexed to" his "crime[s]" when he "committed" those crimes in 1984. . . .

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Several important treatment-related factors—factors of a kind that led the five-Member *People v. Allen* (1985) majority to conclude that the Illinois Legislature's purpose was primarily civil, not punitive—in this action suggest precisely the opposite. First, the State Supreme Court here, unlike the state court in *Allen,* has held that treatment is not a significant objective of the Act. The Kansas court wrote that the Act's purpose is "segregation of sexually violent offenders," with "treatment" a matter that was "incidental at best." . . .

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The record provides support for the Kansas court's conclusion. The court found that, as of the time of Hendricks' commitment, the State had not funded treatment, it had not entered into treatment contracts, and it had little, if any, qualified treatment staff. . . .

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Second, the Kansas statute, insofar as it applies to previously convicted offenders such as Hendricks, commits, confines, and treats those offenders *after* they have served virtually their entire criminal sentence. That time-related circumstance seems deliberate. The Act explicitly defers diagnosis, evaluation, and commitment proceedings until a few weeks prior to the "anticipated release" of a previously convicted offender from prison. . . .

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Third, the statute, at least as of the time Kansas applied it to Hendricks, did not require the committing authority to consider the possibility of using less restrictive alternatives, such as postrelease supervision, halfway houses, or other methods. . . .

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To find a violation of that Clause here, however, is not to hold that the Clause prevents Kansas, or other States, from enacting dangerous sexual offender statutes. A statute that operates prospectively, for example, does not offend the *Ex Post Facto* Clause. . . . Moreover, a statute that operates retroactively, like Kansas' statute, nonetheless does not offend the Clause *if the confinement that it imposes is not punishment* —if, that is to say, the legislature does not simply add a later criminal punishment to an earlier one.

The statutory provisions before us do amount to punishment primarily because, as I have said, the legislature did not tailor the statute to fit the nonpunitive civil aim of treatment, which it concedes exists in Hendricks' case. The Clause in these circumstances does not stand as an obstacle to achieving important protections for the public's safety; rather it provides an assurance that, where so significant a restriction of an individual's basic freedoms is at issue, a State cannot cut corners. Rather, the legislature must hew to the Constitution's liberty-protecting line.

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