

JIMMY RYCE INVOLUNTARY CIVIL COMMITMENT FOR SEXUALLY VIOLENT PREDATORS' TREATMENT AND CARE ACT: REPLACING CRIMINAL JUSTICE WITH CIVIL COMMITMENT

MARI M. “MIKI” PRESLEY*

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I. INTRODUCTION

On September 11, 1995, a nine-year-old boy named Jimmy Ryce stepped off his school bus and disappeared. Months later, somebody noticed the child's backpack in a local ranch hand's trailer. The ranch hand, Juan Carlos Chavez, led authorities to Jimmy's body. Jimmy had been kidnapped, raped, murdered, and dismembered.¹ Juan Chavez was convicted of Jimmy's murder on September 12, 1998.²

The boy's parents, Don and Claudine Ryce, responded to their son's brutal murder by authoring and lobbying the Jimmy Ryce Involuntary Civil Commitment for Sexually Violent Predators' Treatment and Care Act (Jimmy Ryce Act).³ Governor Lawton Chiles signed the Act into law on May 19, 1998,⁴ and it became effective January 1, 1999.⁵ The Act defines certain sex offenders—"sexually violent predators"—as having a mental abnormality and seeks to have these offenders involuntarily and indefinitely committed to an appropriate "secure facility" for treatment,⁶ but only after the offenders have already served their criminal sentences in jail.⁷ Moreover, it applies *only* to persons who have already been convicted of a sexually violent crime.⁸

Although the Florida Legislature passed the Jimmy Ryce Act unanimously, the Act is controversial to courts, academia, and civil rights activists because it raises constitutional concerns: civil rights violations under the Ex Post Facto and the Double Jeopardy Clauses of the United States Constitution and the denial of substantive due process rights. First, many argue that the new Florida law and the recently enacted sexual predator commitment statutes in other states are, in truth, only further punishment of despised criminals. These critics argue that the Jimmy Ryce Act is a thinly veiled effort to circumvent a disappointing criminal justice system by keeping these criminals locked up long past their expired jail sentences.⁹ Such state action would violate the Ex Post Facto Clause (as to

1. See Tom Bayles, *Committee Approves Sex Offender Bill; Predators Would Be Forced Into Treatment*, FLA. TIMES UNION, Mar. 13, 1998, at B4; Jay Weaver, *Measure Could Delay Release of Violent Predators*, FT. LAUD. SUN SENT., Apr. 21, 1998, at B6.

2. See Mike Schneider, *Chavez Convicted of Ryce Murder*, TALL. DEM., Sept. 19, 1998, at C5.

3. See *New Law Keeps Pedophiles Institutionalized After Prison*, FLA. TODAY, May 20, 1998, at B6.

4. See Jimmy Ryce Involuntary Civil Commitment for Sexually Violent Predators' Treatment and Care Act, ch. 98-64, § 24, 1998 Fla. Laws 445, 455 (codified at FLA. STAT. §§ 916.31-.49 (Supp. 1998)) (effective Jan. 1, 1999).

5. See *id.*

6. See FLA. STAT. § 916.37(2) (Supp. 1998).

7. See *id.* § 916.33(1).

8. See *id.* § 916.33(9).

9. See discussion *infra* Part III.

criminals convicted prior to the enactment) and the Double Jeopardy Clause.

The other constitutional dilemma is whether the commitment scheme violates substantive due process. Labeling sexually violent predators as mentally insane is controversial because there is no proof that predators have disturbed mental processes. Predators are evil, not mad.¹⁰ Indeed, Claudine Ryce conceded that “[t]hese people are not insane.”¹¹ The danger in allowing states to blur this distinction, critics argue, is that any number of behavioral patterns are unusual; thus, any number of behavioral patterns could be labeled “insane” by the state under legislation similar to the Jimmy Ryce Act. Accordingly, by employing commitment in lieu of criminal prosecution and by labeling behavior insane rather than criminal, the state could entirely circumvent the system of constitutional protections afforded to persons accused of crimes.

The Jimmy Ryce Act was patterned after a Kansas statute¹² that was found constitutional by the United States Supreme Court in the seminal case *Kansas v. Hendricks*.¹³ Because the Jimmy Ryce Act is nearly identical to the Kansas statute, *Hendricks* presumably establishes the Act’s constitutionality. Therefore, understanding *Hendricks* is essential to any debate concerning the constitutionality and policy of the involuntary civil commitment of sexual predators under the procedures established by the Jimmy Ryce Act.

In *Hendricks*, the Supreme Court determined that the Kansas law was a civil statute, not a criminal one, and therefore, certain constitutional protections, such as the Ex Post Facto and Double Jeopardy Clauses, were simply inapplicable.¹⁴ The Court also found that the Kansas statute did not violate substantive due process requirements.¹⁵ The Court examined the history of civil commitment and determined that the statute was, at heart, indistinguishable from other constitutionally permissible civil commitment statutes.¹⁶ Since the Kansas statute conformed to the historical substantive due process requirements of involuntary civil commitment jurisprudence, it was constitutional.

In this Comment I argue that the Jimmy Ryce Act represents an unconstitutional blurring between civil commitment and criminal incarceration. The commitment procedures established by the Act are outlined in Part II. In Part III, I challenge the conclusion that the

10. See discussion *infra* Part IV.B.

11. Dana Calvo, *New State Law Inspired by Jimmy Ryce Death; Some Sex Predators to Be Held Longer*, FT. LAUD. SUN SENT., May 20, 1998, at B8 (quoting Claudine Ryce).

12. See KAN. STAT. ANN. §§ 59-29a01 to 29a17 (1994).

13. 521 U.S. 346 (1997).

14. See *id.* at 361.

15. See *id.* at 356.

16. See *id.* at 356-58.

Jimmy Ryce Act is civil and not criminal, and in Part IV, I question whether this Act legitimately defines sexual predators as “mentally ill.” In conclusion, I analyze the potential consequences of blurring the line between civil commitment and criminal incarceration.

II. THE JIMMY RYCE ACT PROCEDURE FOR COMMITMENT AND RELEASE

A. Commitment

The Florida Legislature passed the Jimmy Ryce Act on May 1, 1998.¹⁷ The Act directs the Secretary of Children and Family Services to create a multidisciplinary team that will determine whether an inmate is a “sexually violent predator.”¹⁸ The only statutory guideline for the team’s composition is that it must include “two licensed psychiatrists or psychologists, or one licensed psychiatrist and one licensed psychologist.”¹⁹ One hundred and eighty days prior to releasing an inmate convicted of a sexually violent crime,²⁰ the agency controlling the inmate must notify both the multidisciplinary team and

17. See Jimmy Ryce Involuntary Civil Commitment for Sexually Violent Predators’ Treatment and Care Act, ch. 98-64, 1998 Fla. Laws 445 (codified at FLA. STAT. §§ 916.31-.49 (Supp. 1998)).

18. FLA. STAT. § 916.33(3) (Supp. 1998).

19. *Id.*

20. A “sexually violent offense” is defined as the following:

(a) Murder of a human being while engaged in sexual battery in violation of s. 782.04(1)(a)2;

(b) Kidnapping of a child under the age of 16 and, in the course of that offense, committing:

1. Sexual battery; or

2. A lewd, lascivious, or indecent assault or act upon or in the presence of the child;

(c) Committing the offense of false imprisonment upon a child under the age of 16 and, in the course of that offense committing:

1. Sexual battery; or

2. A lewd, lascivious or indecent assault or act upon or in the presence of the child;

(d) Sexual battery in violation of s. 794.011;

(e) Lewd, lascivious, or indecent assault or act upon or in presence of the child in violation of s. 800.04;

(f) An attempt, criminal solicitation, or conspiracy, in violation of s. 777.04, of a sexually violent offense;

(g) Any conviction for a felony offense in effect at any time before October 1, 1998, which is comparable to a sexually violent offense under paragraphs (a)-(f) or any federal conviction or conviction in another state for a felony offense that in this state would be a sexually violent offense; or

(h) Any criminal act that, either at the time of sentencing for the offense or subsequently during civil commitment proceedings under ss. 916.30-916.49, has been determined beyond a reasonable doubt to have been sexually motivated.

Id. § 916.32(8). The Act applies not only to persons convicted after its effective date, but also to persons already in custody when the Act took effect. See *id.* § 916.45.

the relevant state attorney of the inmate's impending release.²¹ The team then determines whether the inmate is a "sexually violent predator."²² A "sexually violent predator" is defined as "any person who: (a) Has been convicted of a sexually violent offense; and (b) Suffers from a mental abnormality or personality disorder that makes the person likely to engage in acts of sexual violence if not confined in a secure facility for long-term control, care, and treatment."²³

Upon receipt of the team's report and recommendation, the state attorney may elect to file a petition requesting the inmate's commitment.²⁴ After the petition for commitment has been filed, the judge must determine if probable cause exists to believe the inmate is a "sexually violent predator" within the meaning of the Act. If so, the inmate must be taken into custody and held in "an appropriate secure facility" until resolution of the commitment proceedings.²⁵ The state attorney may petition for an adversarial probable cause hearing, and if one is granted, the respondent has a right to introduce evidence, be represented by counsel, cross-examine witnesses, and view and copy all reports and petitions in the file.²⁶ The respondent, however, is not entitled to petition the court for an adversarial hearing; only the state attorney has this right.²⁷

The trial for commitment is in many respects similar to a criminal proceeding. It must occur within thirty days after the determination of probable cause, unless either party shows good cause for a continuance.²⁸ The respondent is entitled to counsel and may be appointed a public defender upon the requisite showing of indigence.²⁹ Also, the respondent has a right to demand a trial by jury.³⁰ A court or jury determination that the respondent is a sexually violent predator must be supported by clear and convincing evidence, and in the event of a jury trial, the decision must be unanimous.³¹ If a unanimous verdict is not forthcoming, but a majority of the jurors would classify the respondent as a sexually violent predator, the state attorney may request a new trial.³²

21. See *id.* § 916.33(1)(a).

22. *Id.* § 916.33(3).

23. *Id.* § 916.32(9). The definition of "sexually violent predator" will be analyzed and discussed extensively in Part IV.

24. See *id.* § 916.34.

25. *Id.* § 916.35(4).

26. See *id.* § 916.35(1)-(2).

27. See *id.*

28. See *id.* § 916.36(1)-(2).

29. See *id.* § 916.36(3).

30. See *id.* § 916.36(5).

31. See *id.* § 916.37(1). The Kansas statute, found constitutional by the U.S. Supreme Court, requires a burden of proof beyond a reasonable doubt. See KAN. STAT. ANN. § 59-29a07(a) (1994); *Kansas v. Hendricks*, 521 U.S. 346, 353 (1997).

32. See FLA. STAT. § 916.37(1) (Supp. 1998).

Upon classification as a sexually violent predator, the respondent is committed to the care of the Department of Children and Family Services (Department).³³ The Department must maintain sexually violent predators in a secure facility segregated from civilly committed patients who were not committed under the Jimmy Ryce Act.³⁴

B. Release

During commitment, the inmate must be examined at least once annually to determine whether the inmate's dangerous condition has changed.³⁵ The court must hold a limited probable cause hearing to determine whether probable cause exists "to believe that the person's condition has so changed that it is safe for the person to be at large and that the person will not engage in acts of sexual violence if discharged."³⁶ The inmate has a right to have counsel at the hearing but does not have a right to be present.³⁷

A determination of probable cause warrants the court to set a trial.³⁸ At this stage in the proceedings, however, the inmate has no right to demand a jury trial. The inmate will remain committed if the state proves its burden "by clear and convincing evidence, that the person's mental condition remains such that it is not safe for the person to be at large and that, if released, the person is likely to engage in acts of sexual violence."³⁹ Although an inmate may petition the court for release at any time, if the petitioner has previously filed an unsuccessful petition, the court may deny the petition if the court deems that the petition does not contain facts warranting a probable cause hearing.⁴⁰

III. DOUBLE JEOPARDY AND EX POST FACTO CLAUSES: IS THE COMMITMENT OF SEXUAL PREDATORS SUBSEQUENT TO THEIR JAIL SENTENCE A FUNDAMENTALLY CIVIL OR CRIMINAL PROCEEDING?

A. *Kansas v. Hendricks*

The crux of the majority opinion in *Kansas v. Hendricks*⁴¹ was that the Kansas statute was civil, not criminal; therefore, the constitutional protections of the Ex Post Facto and Double Jeopardy Clauses

33. See *id.* § 916.37(2).

34. See *id.* Although the Act does not specifically prescribe the treatment and care of the inmate, it broadly instructs that "long-term control, care, and treatment of a person committed under [the Act] . . . must conform to constitutional requirements." *Id.* § 916.42.

35. See *id.* § 916.38(1), (3).

36. *Id.* § 916.38(3).

37. See *id.*

38. See *id.*

39. *Id.* § 916.38(4).

40. See *id.* § 916.40.

41. 521 U.S. 346 (1997).

simply did not apply.⁴² The Court based its conclusion on an uncritical evaluation of the statutory language, thereby evading the more difficult substantive constitutional issues.

The Supreme Court began its analysis by noting that the Kansas Legislature unambiguously categorized the statute as civil by virtue of the statute's physical placement in the Kansas Probate Code.⁴³ Accordingly, the Court stated it would not reject the Kansas Legislature's designation unless the party challenging the statute proved the statute to be so punitive as to negate the state's express intent.⁴⁴ The Court distinguished the civil commitment statute from criminal punishment because the statute, according to the Court, did not implicate the primary purposes of criminal punishment—deterrence and retribution.⁴⁵ The Court reasoned that the Kansas statute was not retributive because prior criminal conduct was only relevant in the commitment proceeding to the extent that it demonstrated a "mental abnormality" or proved the requisite level of dangerousness.⁴⁶ Similarly, the Court explained that the statute was not a deterrent because sexually violent predators were statutorily defined as persons who lack volitional control over their actions. Since it is axiomatic that unintentional behavior cannot be deterred, punishment of sexually violent predators, likewise, cannot be dictated by the deterrence rationale.⁴⁷ Finally, the Court observed that the confinement conditions called for by the Kansas statute were more akin to ordinary civil commitment than to criminal detention.⁴⁸

The Court's reasoning fails in two respects. First, the Court reviewed the statute facially without examining the practical effect of the words employed. Second, the Court used unsatisfying semantic criteria (concededly established through Supreme Court precedent) to analyze the distinction between civil legislation and criminal legislation. By doing this, the Court not only failed to give appropriate weight to the practical effect of this statute, it failed to consider how to best accomplish the purposes of the Ex Post Facto and the Double Jeopardy Clauses.

42. See *id.* at 361 (quoting *United States v. Ward*, 448 U.S. 242, 248-49 (1980)).

43. See *id.*

44. See *id.* The Florida Legislature similarly asserts a civil code intent for the Jimmy Ryce Act. See FLA. STAT. § 916.31 (Supp. 1998).

45. See *Hendricks*, 521 U.S. at 362.

46. See *id.*

47. See *id.*

48. See *id.* at 363.

B. *The Practical Reality of the Jimmy Ryce Act*

1. *National Trend*

The Jimmy Ryce Act was enacted in the context of a national movement to “get tough” on sex offenders. Although recent sexual predator commitment statutes have been labeled “civil,” the legislative history indicates that these statutes are actually motivated by punitive intent. For example, one commentator noted that the debate in the Kansas Legislature over the enactment of a sexually violent predator civil commitment statute revealed the Legislature’s lack of concern for treatment and its predominant interest in keeping sex offenders locked up indefinitely:

Debate in the Kansas Legislature focused on confinement of sex offenders rather than treatment. Testifying before a legislative committee, state Attorney General Robert Stephan stated[,] “You have a rare opportunity to pass a law that will keep dangerous sex offenders confined past their scheduled prison sentence.” Special Assistant Attorney General, now Attorney General Carla Stovall, stated[,] “We cannot open our prison doors and let these animals back into our communities.” When the Department of Social and Rehabilitation Services informed the Kansas House Judiciary Committee that, due to ineffective treatment, a civil commitment for many sex offenders will amount to a life sentence, a member of the Task Force promoting the legislation responded[,] “So be it.”⁴⁹

Similarly, Minnesota recently responded to its own supreme court ruling that vacated the commitment of a sexually violent predator by holding a special legislative session to rewrite the law. During this session, “[Governor] Carlson’s spokesman asserted that the governor wished to change the basis of commitment ‘more toward penalty and away from the presumption of rehabilitation,’ while his opponent for the gubernatorial nomination declared that the test for civil commitment should not be ‘the psychological state of the perpetrator.’”⁵⁰ One United States Congressperson even promises to propose a national sexual predator commitment statute.⁵¹

49. Hon. Tom Malone, *The Kansas Sexually Violent Predator Act—Post Hendricks*, J. KAN. B.A., Feb.-Mar. 1998, at 36, 37 (footnotes omitted).

50. Andrew Hammel, Comment, *The Importance of Being Insane: Sexual Predator Civil Commitment Laws and the Idea of Sex Crimes as Insane Acts*, 32 HOUS. L. REV. 775, 789 (1995).

51. See Calvo, *supra* note 11, at B8 (Rep. Lincoln Diaz-Balart, Repub., Miami).

2. *Legislative History in Florida*

In concert with this national trend, the Florida Legislature passed the Jimmy Ryce Act in 1998.⁵² The history of the Act suggests that the legislation could be a punitive response to a tragic crime.⁵³

The Jimmy Ryce Act was part of a package of eleven bills filed in the House and eight bills in the Senate designed to toughen laws concerning sexual predators.⁵⁴ Several of the bills suggested methods to bolster community awareness, such as requiring state notification to all schools and day-care centers regarding a sexual offender's release into their area,⁵⁵ requiring sexual predators to bear automobile tags identifying them as such,⁵⁶ and lengthening the time they will be labeled as sexual predators after parole.⁵⁷ These efforts followed closely on the heels of a chemical castration statute enacted by the Florida Legislature in 1997⁵⁸ and tougher sentencing guidelines established by the Legislature in 1995.⁵⁹

The impetus for the Jimmy Ryce Act in Florida may have stemmed in part from perceived weaknesses in the criminal justice system. One newspaper reporting on the Jimmy Ryce Act expressed the public frustration concerning plea bargains and light sentences in sex offender cases as follows:

Only two of the 11 men listed as sexual predators in Broward County ever served time in prison.

. . . .

All four registered predators in Palm Beach County bypassed prison and went directly to probation, although all were charged with sex crimes against children.

Statewide, 75 percent of 577 sexual offenders found guilty since November 1995 received shorter sentences than called for in state

52. See Jimmy Ryce Involuntary Civil Commitment for Sexually Violent Predators' Treatment and Care Act, ch. 98-64, 1998 Fla. Laws 445 (codified at FLA. STAT. §§ 916.31-.49 (Supp. 1998)).

53. See *supra* Part I. In this respect, the Jimmy Ryce Act follows a string of legislation inspired by tragic crimes. Examples include "Jenna's Law," ending parole for violent felons, "Megan's Law," regarding community notification of the location of sex offenders, and "Joan's Law," imposing life-without-parole on child murderers. See Dale Russakoff, *Out of Grief Comes a Legislative Force*, WASH. POST, June 15, 1998, at A1.

54. See Thomas B. Pfankuch, *Bills Would Prey on Sexual Predators*, FLA. TIMES UNION, Apr. 17, 1998, at B1.

55. See Fla. HB 3737 (1998). On May 28, 1999, House Bill 3737 became law without the Governor's signature. See Act effective July 1, 1998, ch. 98-267, 1998 Fla. Laws 2289 (amending FLA. STAT. § 775.21 (1997)).

56. See Fla. SB 310 (1998) (died in committee).

57. See Fla. SB 514 (1998) (vetoed by the Governor).

58. See Act effective Oct. 1, 1997, ch. 97-184, 1997 Fla. Laws 3455 (codified at FLA. STAT. § 794.0235 (1997)).

59. See Ardy Friedberg & Ty Tagami, *Experts: Toughen Up on Predators; Still, They Disagree on Notification and Treatment*, FT. LAUD. SUN SENT., Mar. 8, 1997, at A1.

guidelines.

. . . . [E]ven designated predators are not likely to go to prison. Harried prosecutors with weak cases often settle for guilty pleas in exchange for lighter sentences.

"They end up getting probation almost regardless of how serious their offense was, and putting them on a list is a pale substitute, and a lame one, for keeping them in prison," said John Morin, a Lauderhill psychologist who treats sex offenders.

Of the 350 offenders he has treated over the past five years, only four went to trial, Morin said. The rest bargained their way out of potentially tougher sentences, which might have included prison. Although many predators were convicted before tougher sentencing guidelines were established by the Legislature in 1995, results since then suggest they still slip through the judicial system with light sentences.

Of the 26 people convicted of sex offenses against minors in Broward since the new guidelines became effective, 23 were given lighter sentences than the guidelines specified, typically because of plea bargains.

The situation is similar in Palm Beach County, where 32 of 36 such offenders were sentenced below the guidelines. In Dade, 44 of 46 got lighter sentences.⁶⁰

Thus, part of the motivation for seeking redress through civil commitment may have been loss of faith in the state's criminal justice system. While understandable, this sentiment strictly undermines our system of jurisprudence. Constitutional protections afforded those who have been charged with crimes must not be so easily circumvented.

The lack of funding for the Jimmy Ryce Act further undermines the notion that Florida will use this program as a genuine attempt at treatment. Although the Department of Children and Family Services estimated the potential first-year cost of the program to be \$60.6 million, less than \$4 million was allocated.⁶¹ After the first year, costs are expected to rise to over \$100 million per year;⁶² moreover, if each predator is committed for a "very long-term" as the Jimmy Ryce Act anticipates,⁶³ that figure will grow each year.⁶⁴ Proponents of the Act

60. *Id.*

61. See Candace J. Samolinski, *Chiles Signs Sexual Predators Law*, TAMPA TRIB., May 20, 1998, at 1.

62. See Grace Frank, *Costs Hinder Jimmy Ryce Act*, TAMPA TRIB., Mar. 13, 1998, at 8.

63. FLA. STAT. § 916.31 (Supp. 1998) ("It is therefore the intent of the Legislature to create a civil commitment procedure for the long-term care and treatment of sexually violent predators.").

64. See Candace J. Samolinski, *When Predators Walk After Horrible Cases of Sexual Abuse, the Florida Legislature Considers Placing Released Convicts in Mental Institutions*, TAMPA TRIB., Mar. 1, 1998, at 1 [hereinafter Samolinski, *When Predators Walk*] (noting that, by the year 2000, the program could cost \$158.6 million per year); see also Candace J.

deny that the Department's estimates are accurate;⁶⁵ however, figures indicate that the allotted amount is inadequate. Kansas, for example, spent \$700,000 to treat fifteen men⁶⁶ while Washington spent \$65,000 per predator.⁶⁷ Similarly, psychologists indicate that "[t]he average cost of private residential treatment is \$50,000 to \$60,000 a year for each patient."⁶⁸ About 8000 predators will be released in 1999 in Florida, roughly 600 of whom the Department expects to be committed.⁶⁹ Representative Alex Villalobos,⁷⁰ the Act's sponsor, estimated that only 60 offenders would be committed in the first year.⁷¹ However, the Department warned against underestimating the figure, commenting that in "[s]tates like Wisconsin and Minnesota that have had the program in place have admitted they expected 10 to 12 people a year and have ended up with 50 or 60."⁷² Although the range of reasonable cost estimates varies, it is safe to conclude that the Legislature funded the project with a minimal, even draconian amount. Because all of those committed must be housed and fed, the gross deficiency in the budget will presumably result in inadequate treatment.

3. *Substantive Provisions of the Jimmy Ryce Act and the Kansas Sexually Violent Predator Act that Indicate Punitive Effect and Intent*

(a) *Practical Effect*

Although the legislative history of the Jimmy Ryce Act reveals the punitive intent of the Florida Legislature, the Act's substantive provisions themselves provide the best evidence of the Act's punitive ef-

Samolinski, *Kansas Law Used for Jimmy Ryce Act*, TAMPA TRIB., Mar. 26, 1998, at 1 [hereinafter Samolinski, *Kansas Law*] ("Operating costs are estimated at \$60 million the first year and projected to climb to nearly \$200 million over the next two years.")

65. See, e.g., Samolinski, *When Predators Walk*, *supra* note 64, at 1 (noting that Sen. Alberto Gutman, Repub., Miami, "scoffed at the department's price estimates"); see also Jay Weaver, *Measure Could Delay Release of Violent Predators*, FT. LAUD. SUN SENT., Apr. 21, 1998, at B6 (stating that Rep. Alex Villalobos, Repub., Miami, estimated that each inmate would cost \$30,000 per year, while the Department estimates the figure at \$100,000 per year). Rep. Villalobos indicated he expected the number of persons committed in Florida to be half that of California, where only 80 sex offenders were committed last year. See Jackie Hallifax, *House Passes "Jimmy Ryce" Bill*, ASSOC. PRESS POL. SERV., Apr. 20, 1998, available in 1998 WL 7406260. However, the Department anticipates 600 commitments in the first year, and it notes that though California only committed 80 in the first two years, it has 330 inmates awaiting decisions. See *id.*

66. See Samolinski, *Kansas Law*, *supra* note 64, at 1.

67. See Samolinski, *When Predators Walk*, *supra* note 64, at 1.

68. Samolinski, *supra* note 61, at 1.

69. See Frank, *supra* note 62, at 8.

70. Repub., Miami.

71. See Calvo, *supra* note 11, at B8.

72. Samolinski, *When Predators Walk*, *supra* note 64, at 1 (quoting Brent Taylor, attorney for Dep't of Child. & Fam. Servs.).

fect and purpose. Both the Kansas and Florida statutes require that the respondent be found both to have a mental abnormality causing a predisposition to commit sexually violent crimes and to be "dangerous." Paradoxically, the only evidence from which to deduce these findings and, hence, to characterize the respondent's current condition, is the respondent's past criminal conduct. Since the commitment trial is held after the inmate has completed serving the original sentence, the conduct that was the basis of the conviction is the last record of the inmate's interaction with the outside community. Any rehabilitation occurring during the period of incarceration may be discredited because the inmate's incapacitation has foreclosed any opportunity to reoffend. The resulting practical effect of the statutory scheme is to permit the fact finder to use past conduct as the sole criteria for making these factual findings. Thus, the distinction between finding that the offender has a present mental abnormality or merely finding that he should be further punished for past behavior is blurred.

(b) *Punitive Intent*

The very title of the Act, "The Jimmy Ryce Involuntary Civil Commitment for Sexually Violent Predators' Treatment and Care Act," intimates that, like ordinary civil commitment statutes, the Act focuses on treatment and care of mentally ill persons. The Jimmy Ryce Act explicitly requires the level of treatment and care that is constitutionally mandated,⁷³ and proponents of the bill touted the need for treatment of sexual predators.⁷⁴ However, several factors belie treatment as the primary motivation for the Jimmy Ryce Act. First, effective treatment is not medically available for sexual offenders.⁷⁵ The statute itself is inconsistent on this point because it requires treatment even though it asserts that sexually violent predators "are unamenable to existing mental illness treatment modalities."⁷⁶

In determining the Kansas statute's constitutionality, the majority in *Hendricks* noted that the statute applied not only to persons convicted of a sexually violent crime, but also to those who had been absolved of criminal responsibility.⁷⁷ Accordingly, the Court reasoned

73. See FLA. STAT. § 916.42 (Supp. 1998).

74. See, e.g., *Senate Oks Bill to Treat Sex Offenders: Inmates Would Undergo Therapy After Prison Terms*, FLA. TODAY, Apr. 25, 1998, at B8 ("We are going to take these people, after due process has been served, and put them in a facility where they can be treated." (quoting Sen. Ron Klein, Dem., Boca Raton)); Tom Bayles, *supra* note 1, at B4 ("In no way is this punishment although it gets them off the streets for treatment." (quoting Sen. Alberto Gutman, Repub., Miami)).

75. See discussion *infra* Part IV.B.

76. FLA. STAT. § 916.31 (Supp. 1998).

77. See *Kansas v. Hendricks*, 521 U.S. 346, 362 (1997).

that the motive for the commitment was not to punish past deeds.⁷⁸ Significantly, Florida's Jimmy Ryce Act requires a criminal conviction or acquittal by reason of insanity in defining a "sexually violent predator."⁷⁹ Consequently, the argument can be applied in the opposite manner. Under the Jimmy Ryce Act, a criminal conviction is an element necessary to be proven; whether a past conviction alone will be sufficient for a finding of "mental abnormality" following *Henricks* remains to be seen.⁸⁰

Another indication of punitive intent revealed in the substantive provisions of the Act is the absence of alternatives less restrictive than total and indefinite confinement. In the involuntary commitment of a nondangerous mentally ill patient, Florida law requires the state to prove that there are no adequate, less restrictive alternatives to total confinement.⁸¹ Commitment is not constitutional if mentally ill patients can receive treatment and live in relative freedom without deteriorating to the point where they become a danger to themselves.⁸²

Similarly, Florida law provides for less restrictive alternatives in the case of insanity acquittees. Under criminal rules of procedure, a court may order appropriate out-patient care in lieu of total confinement.⁸³ The Jimmy Ryce Act does not contain such a less restrictive alternative requirement, though it requires a finding that the person is "likely to engage in acts of sexual violence if not confined in a secure facility for long-term control, care, and treatment."⁸⁴ It remains to be seen whether the courts will construe this language as requiring that no less restrictive alternative will adequately protect against future violations; nonetheless, the lack of provisions for other alternatives is evidence of the Legislature's punitive intent.

The similar lack of any provision for treatment or monitoring of an offender following release from commitment prompts the question whether the Legislature contemplated the offender's eventual release at all. Kansas officials warned the Florida Legislature that it needed to provide for the eventual release of the persons to be committed, including follow-up care and treatment.⁸⁵ The administrator of the country's first predator commitment program in Washington re-

78. See *id.*

79. See FLA. STAT. § 916.32(2), (9)(a) (Supp. 1998).

80. See discussion *supra* Part III.B.3.a.

81. See *In re Smith*, 342 So. 2d 491, 491 (Fla. 1977) (citing *In re Beverly*, 342 So. 2d 481 (Fla. 1977)) (reversing and remanding to determine if there was a "less restrictive alternative" to involuntary commitment for mental illness); *Reigosa v. State*, 362 So. 2d 714, 715 (Fla. 3d DCA 1978) (remanding to determine the possibility of "less restrictive alternatives" to involuntary commitment for mental illness).

82. See *Reigosa*, 362 So. 2d at 715.

83. See FLA. R. CRIM. P. 3.217(b).

84. FLA. STAT. § 916.32(9)(b) (Supp. 1998).

85. See Samolinski, *supra* note 61, at 1.

peated this warning, noting that Washington has very stringent after-release monitoring requirements.⁸⁶ Florida eschewed this advice, neglecting to provide follow-up treatment or commitment procedures for determining whether a less restrictive alternative would be adequate to care for the inmate and protect society.

In the context of insanity acquittees, Florida courts have found that although Florida statutes do not expressly permit conditional release of persons committed, such authority is inherently vested in the court by virtue of its continuing jurisdiction over the person committed.⁸⁷ One court noted:

The alternative is to condemn all those who are not utterly free of an underlying mental illness to lifelong commitment in a mental hospital, regardless of the degree to which they can function and exercise control over themselves in society and regardless of the therapeutic effect of exposure to the outside world. In effect, denying the possibility of conditional release is “tantamount to an elaborate mask for preventive detention” of the mentally ill.⁸⁸

Finally, the Jimmy Ryce Act calls for treatment and commitment only after the state has extracted a full measure of punishment in the state’s prison system. As Justice Breyer noted in his dissent in *Hendricks*, any act that provides for treatment only after time has been served begins to look like punishment—a means to keep the criminal locked up—not a means to treat a sick mind.⁸⁹

A related argument is that both of these recent sexual predator commitment statutes effectively create a controversial branch of mental illness that ostensibly justifies involuntary civil commitment.⁹⁰ This new branch is termed a “mental abnormality” and is defined as “a mental condition affecting a person’s emotional or volitional capacity which predisposes the person to commit sexually violent offenses.”⁹¹ If, as indicated by the majority opinion in *Hendricks*, this definition means that a sexually violent predator lacks volitional control over his or her actions, the Legislature would be expected to eschew criminal punishment altogether, opting instead for civil commitment in the first instance. In other words, if these legislatures truly endorse the controversial perspective that persons who commit sexually violent crimes suffer from a mental illness, and *that condition* makes them a danger to society, then it should not assess criminal culpability. In the normal course of action, those who commit

86. See Samolinski, *When Predators Walk*, *supra* note 64, at 1.

87. See, e.g., *Hill v. State*, 358 So. 2d 190, 205 (Fla. 1st DCA 1978).

88. *Id.*

89. See *Kansas v. Hendricks*, 521 U.S. 346, 381 (1997) (Breyer, J., dissenting).

90. See discussion *infra* Part IV.B.

91. FLA. STAT. § 916.32(5) (Supp. 1998).

crimes due to *mental illness* are not prosecuted; they are committed.⁹²

C. *The Hendricks Court's Deference to Semantic Differences Between the Words Civil and Criminal and Its Failure to Give Effect to the Purposes of the Ex Post Facto and the Double Jeopardy Clauses*

1. *Precedents Defining a Statute as Civil or Criminal*

The methods historically employed by the Supreme Court to determine whether a statute is civil or criminal seem generally unhelpful in analyzing the sexually violent predator commitment schemes. Concededly, where a legislature expresses the intent that a statute be construed as a civil statute, the Court will not find contrary intent unless the statute is so punitive in purpose or practical effect as to negate the expressly declared intent of the legislature.⁹³ The Court has considered the following factors when deciding whether a statute is civil or criminal:

[w]hether the sanction involves an affirmative disability or restraint; whether it has historically been regarded as a punishment, whether it comes into play only on a finding of scienter, whether its operation will promote the traditional aims of punishment—retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned⁹⁴

In *Hendricks*, the Court's application of these factors to the Kansas sexual predator commitment statute failed in two respects. First, the Court accepted the facial designation of the state action as "civil commitment" for purposes of analyzing these factors.⁹⁵ The Court seemed to assume *arguendo* that the statute called for civil commitment. Then, using the civil commitment paradigm created through historic precedent, the Court concluded that this statute was indistinguishable from ordinary civil commitment, so it was civil. For example, the *Hendricks* Court noted that civil commitment is not traditionally construed as punishment.⁹⁶ This analysis begs the question; the very point to be made is that these sexually violent predator commitment acts do not call for civil commitment in any legitimate sense. Presumably, being locked up in a cell indefinitely is punish-

92. See discussion *infra* Part IV.

93. See, e.g., *Hendricks*, 521 U.S. at 361; *Allen v. Illinois*, 478 U.S. 364, 368-69 (1986).

94. *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963) (footnotes omitted), *cited with approval in Hendricks*, 521 U.S. at 362.

95. See *Hendricks*, 521 U.S. at 361-62.

96. See *id.* at 363.

ment, regardless of whether the shingle over the institutional door reads “jail” or “hospital.”

Similarly, by accepting the “civil commitment” classification, the Court found that no particular offense had been created to invoke commitment under the Kansas statute; yet the trial for the non-offense contained essentially criminal procedural safeguards.⁹⁷ Again facially construing the statute, the Court cited the lack of a scienter element as evidence of the Kansas Legislature’s non-punitive purpose.⁹⁸ However, to the extent that the statute applied to persons who had been convicted of a prior sex offense requiring scienter, the Legislature effectively incorporated this scienter requirement. Because the Court accepted the civil commitment paradigm for its analysis, it failed to note that the statute, though arguably formalistically indistinguishable from civil commitment statutes, was similarly indistinguishable from continued criminal incarceration.

The primary purpose of the sexual predator commitment statutes is incapacitation,⁹⁹ which can be either civil or criminal.¹⁰⁰ The majority of the *Hendricks* Court denied that the Kansas statute served a general deterrent purpose because a sexually violent predator by definition could not control his or her behavior.¹⁰¹ The dissent pointed out, however, that criminal incarceration not only serves a general deterrence purpose as a threat of punishment to would-be criminals, but it also serves as specific deterrence by incapacitating those who have committed crimes.¹⁰² On occasions prior to *Hendricks*, the U.S. Supreme Court has observed: “It would be archaic to limit the definition of ‘punishment’ to ‘retribution.’ Punishment serves several purposes: retributive, rehabilitative, deterrent—and preventive. One of the reasons society imprisons those convicted of crimes is to keep them from inflicting future harm, but that does not make imprisonment any the less punishment.”¹⁰³

As with criminal incarceration, civil commitment serves multiple purposes, only one of which is incapacitation. Civil commitment is traditionally justified under either the state’s *parens patriae* power

97. See *id.* at 370-71 (explaining the inapplicability to the Kansas statute of the successive prosecution “same elements” test enunciated in *Blockburger v. United States*, 284 U.S. 299 (1932), and concluding the statute survives a Double Jeopardy Clause challenge).

98. See *id.* at 362.

99. See, e.g., Calvo, *supra* note 11, at B8; see also, Samolinski, *When Predators Walk*, *supra* note 64, at 1 (citing the lack of a statutory monitoring plan to indicate confinement as the Jimmy Ryce Act’s primary thrust).

100. See, e.g., *United States v. Ursery*, 518 U.S. 267, 292 (1996) (holding that the purpose of deterrence may serve both civil and criminal goals).

101. See *Hendricks*, 521 U.S. at 362.

102. See *id.* at 380-81 (Breyer, J., dissenting).

103. *United States v. Brown*, 381 U.S. 437, 458 (1965).

or its police power.¹⁰⁴ According to its *parens patriae* role, the state is obligated to provide and care for individuals who, due to a mental condition, cannot provide for themselves.¹⁰⁵ The corollary doctrine of police power obligates the state to protect its citizens from dangerous, mentally ill persons.¹⁰⁶ When the state acts under its police power, it acts to incapacitate the mentally ill persons—a deterrent purpose. Thus, confinement on the basis of incapacitation serves both civil and criminal purposes.

The Court should look beyond semantic differences between common, historical uses of the words civil and criminal to determine the practical effect of the statute and to promote the purposes of the constitutional protections sought to be enforced. As noted above, the practical effects of the Jimmy Ryce Act prove it to be so punitive as to outweigh the Legislature's nominal civil designation. Moreover, analysis of the purposes of the Ex Post Facto and the Double Jeopardy Clauses reveals that the purposes of these provisions can be best served by treating the Jimmy Ryce Act as criminal punishment.

2. Purposes of the Ex Post Facto and Double Jeopardy Clauses

(a) Ex Post Facto Clause

The Federal Ex Post Facto Clause¹⁰⁷ prohibits states from enacting legislation that relates back to a prior act if the legislation does the following: (1) outlaws behavior which was innocent when the prior act was committed; (2) "aggravates" the crime, making it a greater crime than when it was committed; (3) increases the punishment for the offense; or (4) alters the rules of evidence unfavorably to the defendant making it easier to obtain a conviction.¹⁰⁸ However, the Ex Post Facto Clause only applies to "criminal statutes"¹⁰⁹ and serves two primary purposes: it promotes fairness by protecting an individual's expectations as to the probable outcome of his or her behavior, and it regulates the functioning of our government by preventing legislative abuses, thereby maintaining a system of law, not of men.¹¹⁰

104. See KENT S. MILLER, *MANAGING MADNESS: THE CASE AGAINST CIVIL COMMITMENT* 16 (1976).

105. See *id.*

106. See *id.* at 16-18.

107. U.S. CONST. art. I, § 10, cl. 1.

108. See *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 390 (1798).

109. See *id.* at 390-91; *California Dept. of Corrections v. Morales*, 514 U.S. 499, 504-05 (1995) (finding that although the Ex Post Facto Clause forbids retroactively increasing punishment for criminal acts, it does not forbid an amendment that decreases the frequency of parole suitability hearings available to a petitioner convicted prior to the amendment).

110. See LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 629-32 (1988).

(b) Double Jeopardy

The Double Jeopardy Clause provides that a person shall not be punished twice for the same offense.¹¹¹ This principle “has been declared by many jurists to be a part of the universal law of reason, justice, and conscience.”¹¹² The rule against multiple punishments protects the individual by avoiding unnecessary harassment and social stigma, economizing time and money, and protecting “the interest in psychological security.”¹¹³ However, the prohibition serves an important institutional purpose as well. Having a fixed punishment is a hallmark of legitimate governance; a system that would permit the government to seek a second punishment merely because it was dissatisfied with the initial sentence imposed would be tyrannical. Thus, the Ex Post Facto and Double Jeopardy Clauses seek to protect both the individual and the adjudicative institution. The sexual predator commitment procedures at issue in *Hendricks* and those created by the Jimmy Ryce Act seek to circumvent the protections afforded the criminal justice system by our Constitution merely by labeling one pattern of behavior civilly insane rather than criminal. This abuse of process is the very systemic failure these clauses seek to prevent.

IV. SUBSTANTIVE DUE PROCESS

A. *Substantive Due Process and Involuntary Civil Commitment*

The U.S. Supreme Court has established two criteria to be met for involuntary commitment to satisfy the substantive due process requirements of the Federal Constitution: the person to be committed must be “mentally ill” and must be dangerous to himself or society.¹¹⁴ In the civil context, these criteria must be established by some standard of proof beyond a preponderance of the evidence, though the criminal standard of beyond a reasonable doubt is not necessary.¹¹⁵ Although the Court has never sought to impose any certain definition of mental illness upon state legislatures, it is clear that there are some limits upon the state’s authority to categorize individuals as insane for commitment purposes. Even if a person has an antisocial personality and may pose a danger to society, that person cannot be committed unless he also has a mental illness.¹¹⁶ This is because such

111. U.S. CONST. amend. V.

112. JAY A. SIGLER, *Preface to DOUBLE JEOPARDY: THE DEVELOPMENT OF A LEGAL AND SOCIAL POLICY* v (1969) (citing *United States v. Keen*, 27 F. Cas. 686 (C.C.D. Ind. 1839) (No. 15,510)).

113. *Id.*

114. *See, e.g.*, *Foucha v. Louisiana*, 504 U.S. 71, 75-76 (1992).

115. *See Addington v. Texas*, 441 U.S. 418, 431-32 (1979).

116. *See Foucha*, 504 U.S. at 80.

a person is indistinguishable from most persons who commit crimes and are punished under our criminal justice system.¹¹⁷

Additionally, the state is constricted from punishing or committing persons solely for having “evil” thoughts. The state must prove the defendant is dangerous, that he or she presents a threat of actual harm to himself or others.¹¹⁸ Where a person suffers from a mental illness, but poses no actual danger to himself or society, he may not be committed because this condition does not justify the massive invasion of the patient’s personal liberty that indefinite commitment imposes.¹¹⁹ Thus, while the state is not wholly free to categorize mentally ill people for commitment purposes, the state may constitutionally seek preventive detention of individuals who have some mental condition that causes them to be a danger to themselves or others. Sexual predator commitment statutes like the Jimmy Ryce Act facially require such a condition.

In *Hendricks*, the Supreme Court granted wide deference to the state legislature in defining mental illness, stating, “As we have explained regarding congressional enactments, when a legislature ‘undertakes to act in areas fraught with medical and scientific uncertainties, legislative options must be especially broad and courts should be cautious not to rewrite legislation.’”¹²⁰ Though the Court did not expressly state the applicable standard of review, its language and analysis were consistent with a minimal rationality test.¹²¹ Opponents of the sexual predator commitment statutes would argue that heightened scrutiny is appropriate, as it would permit the Court to reach beyond the statute’s requirement of a mental abnormality to critically analyze the legislative intent and practical effect.

In substantive due process jurisprudence, the Supreme Court uses both minimal rationality review and strict scrutiny.¹²² Federalist and separation of powers doctrines dictate that the Court give deference to the reasonable acts of state legislatures.¹²³ Accordingly, in most cases where state legislation is challenged as violative of substantive due process, the Court will subject the statute to a minimal rationality or rational basis review.¹²⁴ Under this extremely deferential and permissive test, “the government action is presumed to be constitutional, and [the] claimant has the burden of proving that the depriva-

117. See *id.* at 82-83.

118. See *id.* at 75-76.

119. See *O'Connor v. Donaldson*, 422 U.S. 563, 575 (1975).

120. *Kansas v. Hendricks*, 521 U.S. 346, 360 n.3 (1997) (quoting *Jones v. United States*, 463 U.S. 354, 370 (1983)).

121. See generally *id.* at 359-60.

122. See James W. Hilliard, *To Accomplish Fairness and Justice: Substantive Due Process*, 30 J. MARSHALL L. REV. 95, 105 (1996).

123. See generally *id.* at 95-105.

124. See *id.* at 105.

tion is not even an arguably rational method for furthering any conceivable valid government interest."¹²⁵ The Court will not second-guess the state legislature by reviewing its motives or by requiring it to justify either its factual findings or the effectiveness of the statutory scheme in light of its stated objectives.¹²⁶

Strict scrutiny is reserved for the rare instances where the legislation implicates a fundamental right.¹²⁷ When the Court adopts strict scrutiny, it requires the state to prove that the statute is narrowly tailored to further a compelling state interest.¹²⁸ Using this test, the Court rigorously analyzes the legislature's motive and intent, and subjects its findings to careful scrutiny to ensure that no less drastic measure exists to adequately protect the state's compelling interest.¹²⁹

Although freedom from bodily restraint in the form of involuntary commitment would seem to be a rudimentary liberty interest, it is unclear whether the Supreme Court considers it a "fundamental right" triggering strict scrutiny under substantive due process jurisprudence. In *Hendricks*, the Court did not explicitly adopt any particular standard of review, but it appeared to apply a minimum rationality test. The Court acknowledged that "freedom from physical restraint 'has always been at the core of the liberty protected by the Due Process Clause from arbitrary government action,'" but it emphasized that this liberty interest is not absolute.¹³⁰

The Court in *Hendricks* was willing to sacrifice this liberty interest so long as the involuntary commitment occurred "pursuant to proper procedures and evidentiary standards."¹³¹ Moreover, the Court declared itself to be especially inclined to deference in light of the scientific uncertainties surrounding the nature of sexual predation.¹³² The dissent appears to agree with the majority as to the requisite level of deference, stating that "the Constitution gives States a degree of leeway in making this kind of determination."¹³³ Echoing the majority as to deference in light of scientific uncertainty, the dissent stated, "The psychiatric debate . . . helps to inform the law by setting the bounds of what is reasonable, but it cannot here decide just how states must write their laws within those bounds."¹³⁴ By apparently

125. Russell W. Galloway, Jr., *Basic Substantive Due Process Analysis*, 26 U.S.F. L. REV. 625, 643-44 (1992).

126. *See id.* at 644-45.

127. *See* Galloway, *supra* note 125, at 638-39.

128. *See, e.g., Roe v. Wade*, 410 U.S. 113, 155 (1973).

129. *See* Galloway, *supra* note 125, at 638-39.

130. *Kansas v. Hendricks*, 521 U.S. 346, 356 (1997) (quoting *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992)).

131. *Id.* at 357.

132. *See id.* at 360 n.3.

133. *Id.* at 374 (Breyer, J., dissenting).

134. *Id.* at 375.

applying a reasonableness review, the Court in *Hendricks* implicitly rejected the notion of freedom from involuntary commitment as a fundamental right. The Court failed to acknowledge this result explicitly, and it offered no explanation as to why such a massive curtailment of individual liberty did not warrant strict scrutiny.

Supreme Court precedent on this point is inconsistent and unhelpful. For example, in *Foucha v. Louisiana*,¹³⁵ the Court struck down a state law allowing continued confinement of an insanity acquittee because he was no longer mentally ill. The Court noted the “‘importance and fundamental nature’ of the individual’s right to liberty,” stating that “[f]reedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause”¹³⁶ Having noted the important interest at stake, however, the Court failed to adopt any recognized standard of review. Although the Court stated that “due process requires that the nature of commitment bear some reasonable relation to the purpose for which the individual is committed,”¹³⁷ suggesting a rational relationship test, the Court invalidated the statute because it was not “sharply focused,” nor “carefully limited,”¹³⁸ suggesting heightened scrutiny. Justice Thomas pointedly criticized the majority for this ambiguity and for its failure to state specifically what right was at issue and whether it was fundamental.¹³⁹

Proponents of the sexual predator commitment statutes argue that deference to the state legislature is appropriate because the definition of mental illness has a normative component that is legitimately determined only by the state. Moreover, they claim the robust debate in the scientific community concerning the nature of sexual predation and its characterization as a “mental illness” is evidence that the legislature acted permissibly.¹⁴⁰ However, under these commitment acts, the person to be committed would be free but for these statutes. Thus, while a convicted felon may not have a fundamental right to freedom from bodily restraint prior to serving his or her sentence, persons involuntarily committed do. If freedom from indefinite involuntary commitment is not a fundamental right, what could be?

135. 504 U.S. 71 (1992).

136. *Id.* at 80 (quoting *Youngberg v. Romeo*, 457 U.S. 307, 316 (1982)).

137. *Id.* at 79.

138. *Id.* at 81.

139. *See id.* at 116-17 (Thomas, J., dissenting) (concluding that rational basis review was appropriate). *See also generally* *The Supreme Court, 1991 Term—Leading Cases*, 106 HARV. L. REV. 210 (1992) (discussing the Court’s departure from the ordinary substantive due process two-tier framework).

140. *See, e.g.,* *Kansas v. Hendricks*, 521 U.S. 346, 373-74 (1997) (Breyer, J., dissenting).

B. "Mental Abnormality" as Satisfying the "Mental Illness" Requirement for Involuntary Commitment

The proposition that persons who commit sex related crimes are "mentally ill" is controversial in the scientific and legal communities. The Kansas and Florida statutes create a new category of "mental illness" for sexually violent predators. Both statutes describe a "sexually violent predator" as a person who suffers from a "mental abnormality," defined in both as a "mental condition affecting a person's emotional or volitional capacity which predisposes the person to commit sexually violent offenses."¹⁴¹ This new category has been criticized because it is circular and ambiguous, has no medical analog, and blurs the distinction between the criminal and the insane.

1. The Definition Is Circular and Ambiguous

Critics have condemned the definition of "mental abnormality" in recent sexual predator acts as a mere tautology.¹⁴² A sexually violent predator must have a mental abnormality predisposing that person to commit sexually violent acts,¹⁴³ but mental abnormality is also defined by the propensity to commit violent acts.¹⁴⁴ Thus, the criminal behavior is the cause, the symptom, and the effect of the purported abnormality.¹⁴⁵ In its amicus brief filed with the Supreme Court in

141. FLA. STAT. § 916.32(5), (9) (Supp. 1998); accord KAN. STAT. ANN. § 59-29a02(a), (b) (1997).

142. See Amicus Brief for the Washington State Psychiatric Assoc. in Support of Respondent at 16, *Kansas v. Hendricks*, 521 U.S. 346 (1997) (No. 95-1649) (citing *Young v. Weston*, 898 F. Supp. 744, 750 (W.D. Wash. 1995)) [hereinafter WSPA Brief].

143. See FLA. STAT. § 916.32(9) (Supp. 1998) (defining "sexually violent predator" as any person who "[h]as been convicted of a sexually violent offense" and who "[s]uffers from a mental abnormality or personality disorder that makes the person likely to engage in acts of sexual violence if not confined in a secure facility for long-term control, care, and treatment") (emphasis added).

144. See *id.* § 916.31 (defining "mental abnormality" as a "mental condition affecting a person's emotional or volitional capacity which predisposes the person to commit sexually violent offenses").

145. See Kelly A. McCaffrey, Comment, *The Civil Commitment of Sexually Violent Predators in Kansas: A Modern Law for Modern Times*, 42 U. KAN. L. REV. 887, 908 (1994). McCaffrey describes the circularity problem as follows:

Another possible danger is that "'mental abnormality' will be established in a circular manner only by virtue of the sexual offending behavior itself. In that case, the abnormality is derived from the sexual behavior which in turn is used to establish the predisposition to other sexual behavior." It has also been argued that the term "'mental abnormality' has no clinically significant meaning and no recognized diagnostic use." . . . Thus, the "causative relationship that must be shown under the statute between the disorder and the criminal sexual behavior . . . is often a matter of speculation or meaningless circularity."

Id. (citations omitted); see also John Kip Cornwell, *Protection and Treatment: The Permissible Civil Detention of Sexual Predators*, 53 WASH. & LEE L. REV. 1293, 1319-20 (1996) (noting the circularity problem but arguing that under such definitions, not all persons who have committed sexually violent crimes will be found to have mental illnesses); Hamel, *supra* note 50, at 796 (addressing the circularity in a similar Washington statute).

Hendricks, the Washington State Psychiatric Association (WSPA) described the circular effect of the definitions in these acts.¹⁴⁶ Since a personality disorder is merely a label attached to recognized patterns of behavior, the state can label some pattern of behavior a “personality disorder,” then declare that disorder a mental illness worthy of commitment.¹⁴⁷ As the WSPA points out, however, this process is a chicken-and-egg problem of causation.¹⁴⁸

Moreover, not only is the criminal misconduct the a priori manifestation of the “mental abnormality” under these acts, it also establishes the “dangerousness” element necessary to satisfy substantive due process for civil commitment. The Supreme Court has held that conviction for a crime may create a presumption of dangerousness.¹⁴⁹ Thus, the dangerousness element for sex offenders is established by virtue of having been convicted of a sex crime. If the two elements constituting the definition of mental abnormality collapse into one requirement—criminal behavior—then the criminal behavior ipso facto establishes the basis for commitment. This collapse into one previously proven requirement raises the specter of double jeopardy where the person to be committed already has served one criminal sentence for that prior behavior.

If one concedes that the definition calls for some *condition* that *causes* the criminal behavior, the problem of vagueness must still be addressed. The terms “mental abnormality” or “personality disorder” are so overinclusive as to include a whole range of people, from nicotine addicts to persons with rabid mental illnesses.¹⁵⁰ Indeed, though the acts are restricted to sex offenders, the same logic could uphold commitment of a variety of repeat offenders, such as bank robbers or drunk drivers.¹⁵¹ The only limit for defining mental illness supplied by the *Hendricks* Court was that the Court’s approval of the Kansas definition of mental illness apparently hinged on the fact that the statutory definition narrows the class of potentially eligible offenders to those who have a condition “that makes it difficult, if not impossible, for the person to control his dangerous behavior.”¹⁵² Additionally, Justice Kennedy warned in his concurring opinion that while the *Hendricks* case appeared to meet the constitutional requirements for mental illness, Supreme Court precedent would not uphold cases in

146. See WSPA Brief, *supra* note 142, at 17.

147. See *id.* at 17-18.

148. See *id.*

149. See *Jones v. United States*, 463 U.S. 354, 364-65 (1983).

150. See *Leading Case—Involuntary Commitment of Violent Sexual Predators*, 111 HARV. L. REV. 259, 267-68 (1997).

151. See *id.* at 268; see also Brian J. Pollock, Note, *Kansas v. Hendricks: A Workable Standard for “Mental Illness” or a Push Down the Slippery Slope Toward State Abuse of Civil Commitment?*, 40 ARIZ. L. REV. 319, 346-48 (1998).

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

the future if “mental abnormality” proved to be “too imprecise a category to offer a solid basis for concluding that civil detention is justified.”¹⁵³ Justice Kennedy offered no guiding principles for defining mental illness, apparently opting instead to leave that task to the crucible of future case-by-case development.¹⁵⁴

2. *The Definition Has No Scientific Analog*

(a) *Do Sexual Predators Suffer from a “Mental Illness?”*

Another criticism of the new category of mental illness created in the sexual predator commitment acts is that the category is a purely legal creation, without a scientific, medical basis.¹⁵⁵ Ordinarily, psychiatrists speak of “mental illness” only when a person’s cognitive or functioning process is distorted.¹⁵⁶ As one psychiatrist noted:

[M]ental illness is different in that it affects the decision-making process of the organism, it affects his mind, disturbs his intellectual ability such as memory, concentration, abstract thinking and judgment, disturbs the process of logical thought, impairs verbal communication, affects the symbolic processes and alienates the victim from his environment and from himself.¹⁵⁷

Abnormal behavior, such as criminal acts of sexual violence, do not indicate a “mental illness” unless the perpetrator’s thought processes have been distorted by mental disease.¹⁵⁸ The American Psychiatric Association noted, “Neither deviant behavior (e.g., political, religious, or sexual) nor conflicts that are primarily between the individual and society are mental disorders unless the deviance or conflict is a symptom of a dysfunction in the individual”¹⁵⁹ A sex offender is not mentally ill because he has an “abnormal” desire and a willingness to act on it.¹⁶⁰ Instead, this “antisocial” behavior is characteristic of many types of offenders—it makes the perpetrator criminal, not insane.¹⁶¹

153. *Id.* at 373 (Kennedy, J., concurring).

154. *See id.*

155. *See, e.g.,* James D. Reardon, *Sexual Predators: Mental Illness or Abnormality? A Psychiatrist’s Perspective*, 15 U. PUGET SOUND L. REV. 849 (1992) (discussing that the Washington Legislature passed the Washington Sexually Violent Predators Act, which was drafted without the participation of a psychiatrist).

156. *See id.* at 852 (“A psychiatrist’s definition of ‘mental disorder’ includes the loss of contact with reality, confusion, loss of reason, or hallucinations.”).

157. MICHAEL ALFRED PESZKE, *INVOLUNTARY TREATMENT OF THE MENTALLY ILL: THE PROBLEM OF AUTONOMY* 55 (Ralph Slovenko ed., 1975).

158. *See id.*

159. AMERICAN PSYCHIATRIC ASS’N, *DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS* xxii (4th ed. 1994).

160. *See* Robert F. Schopp, *Sexual Predators and the Structure of the Mental Health System: Expanding the Normative Focus of Therapeutic Jurisprudence*, 1 PSYCHOL. PUB. POL’Y & L. 161, 188 (1995).

161. *See, e.g.,* Reardon, *supra* note 155, at 851.

Critics of the sexually violent predator commitment acts argue that mental illness is not the cause of a predator's actions.¹⁶² Instead, the sexual predator simply lacks the moral restraint to refrain from acting on sexual impulses.¹⁶³ One commentator criticized the mental disorder component of recent sexually violent predator acts, noting that nothing in the definitions of these acts indicated "anything other than desire to engage in criminal conduct and willingness to act on that desire."¹⁶⁴ Furthermore,

[a]ny voluntary conduct suggests the presence of some motivation to engage in such conduct, but the mere presence of desire or impulse provides no suggestion of exculpatory or incapacitating significance. Those who are greedy experience a strong desire for wealth, but greed neither exculpates those who commit theft nor suggests that they suffer disorder that renders them unable to control their acquisitive conduct or incompetent for any legal purpose.¹⁶⁵

Thus, the very categorization of sex offenders as "mentally ill" is at issue.

(b) *Can Sexual Predators Be Treated?*

The commitment of "sexual predators" has been criticized on the basis that no effective treatment exists.¹⁶⁶ These critics argue that because no treatment is known, commitment cannot help cure the offender and, hence, such commitment is merely incarceration.¹⁶⁷ Commitment under these conditions is only one step away from pure preventive detention.¹⁶⁸ However, proponents of the statutes rightly argue that the state is only required to attempt a cure, not to succeed in curing the person committed.¹⁶⁹ The fact that no cure is known does not alter the fact that a disease exists, nor does it alter the state's authority to protect society.¹⁷⁰

162. See Schopp, *supra* note 160, at 188.

163. See *id.*

164. *Id.*

165. *Id.*

166. See, e.g., Gary Gleb, Comment, *Washington's Sexually Violent Predator Law: The Need to Bar Unreliable Psychiatric Predictions of Dangerousness from Civil Commitment Proceedings*, 39 UCLA L. REV. 213, 238-40 (1991).

167. See, e.g., Beth Keiko Fujimoto, Comment, *Sexual Violence, Sanity and Safety: Constitutional Parameters for Involuntary Civil Commitment of Sex Offenders*, 15 U. PUGET SOUND L. REV. 879, 906-08 (1992).

168. See *Foucha v. Louisiana*, 504 U.S. 71, 83 (1992).

169. See Katherine P. Blakey, Note, *The Indefinite Civil Commitment of Dangerous Sex Offenders Is an Appropriate Legal Compromise Between "Mad" and "Bad"—A Study of Minnesota's Sexual Psychopathic Personality Statute*, 10 NOTRE DAME J. L. ETHICS & PUB. POL'Y 227, 255-58 (1996).

170. See *id.*

On the other hand, psychiatrists argue that no treatment exists *because there is no "disease" to treat*. If sexual predators do not suffer from mental illness but, instead, have abnormal desires and make cruel moral decisions, "treating" them would be like "treating" a person for preferring to eat dog food rather than human food or for hating racial minorities.¹⁷¹ Thus, while it can be conceded that commitment may be appropriate for mental illnesses even when effective treatment is unknown, commitment is inappropriate if the problem is inherently untreatable because it is not an illness.

3. *The Definition of "Mental Abnormality" in Sexual Predator Commitment Acts Blurs the Distinction Between Criminal and Insane*

(a) *Treating Sexual Predators as Criminals*

Some support the view that a sexual offender may suffer from an antisocial personality disorder that is indistinguishable from antisocial tendencies revealed in other types of offenders.¹⁷² This school of thought denies that there is "mental illness" present in most sex offenders because the offender's thought processes and responses are not affected.¹⁷³ Following this school of thought, sex offenders should be punished only as criminals and only through the criminal justice system.¹⁷⁴ Under this view of sexual predation, commitment would be bald preventive detention, unknown to our system of jurisprudence, or punishment in violation of the double jeopardy provision of the U.S. Constitution.¹⁷⁵

Defenders of the commitment acts point out that preventive detention is *always* a motive for civil commitment; indeed, it is constitutionally mandated in the "dangerousness" component of civil commitment.¹⁷⁶ Moreover, they argue that imposing longer criminal sentences or increasing the sentences for multiple offenses are also methods of preventive detention.¹⁷⁷ While these points may be conceded, the legitimacy of civil commitment is contingent upon the legitimacy of categorizing sexual predators as mentally ill.

The Jimmy Ryce Act facially requires a condition that assertedly satisfies the mental illness requirement; however, detractors claim the Act is mistaken as to the nature of sexual predation, that it is

171. See e.g., Schopp, *supra* note 160, at 188 (being greedy neither excuses theft nor indicates an inability to control greed-based urges).

172. See, e.g., Reardon, *supra* note 155, at 850.

173. See discussion *supra* Part IV.B.2.

174. See, e.g., Schopp, *supra* note 160, at 190-91.

175. See Reardon, *supra* note 155, at 850.

176. See discussion *supra* Part III.A.; *Kansas v. Hendricks*, 521 U.S. 346, 362 (1997).

177. See Alexander D. Brooks, *The Constitutionality and Morality of Civilly Committing Violent Sexual Predators*, 15 U. PUGET SOUND L. REV. 709, 719 (1992).

circular, or is merely a pretext for further incarceration.¹⁷⁸ Further, these detractors note that “truly” mentally ill sex offenders—whose mental processes are disturbed—would qualify for commitment under ordinary commitment statutes.¹⁷⁹ Other sex offenders, who are responsible moral agents, are more appropriately addressed through the criminal justice system.¹⁸⁰ Otherwise, the foundation of our criminal justice system—culpability—is undermined, and the primary function of the civil commitment system—therapeutic treatment—is distorted.¹⁸¹

(b) *Treating Sexual Predators as Insane*

The Jimmy Ryce Act assumes that sexual predators who are subject to the Act suffer from a bona fide mental illness and are susceptible to treatment.¹⁸² Under the Act, sexual predators are defined by a lack of volitional control over their actions due to mental illness.¹⁸³ The Act’s assumptions logically lead to the conclusion that such persons are incapable of criminal culpability as our system of jurisprudence understands it and, therefore, should be dealt with through civil commitment. Moral culpability requires the volitional behavior, which gives rise to the capability of choosing to act “recklessly, knowingly, or purposefully.”¹⁸⁴ Implicit in our system of criminal justice is the notion that responsibility requires cognitive capacity and minimal self-control (volitional capacity).¹⁸⁵ Minnesota Supreme Court Justice Gardebring noted the incongruity in convicting a person of a crime that requires mens rea, yet later confining that person because he is mentally unable to control his actions: “I believe the state cannot have it both ways.”¹⁸⁶

178. See e.g., McCaffrey, *supra* note 145, at 908 (arguing that statutory terms are legal and not clinical terms and “mental abnormality” is defined in circular fashion).

179. See *id.* at 897. In *Foucha*, the court upheld the constitutionality of a Louisiana statute, which provided for the automatic civil commitment of criminal defendants acquitted by reason of insanity. See *Foucha v. Louisiana*, 504 U.S.71 (1992).

180. See Schopp, *supra* note 160, at 191.

181. See *id.* at 192.

182. The Florida Act is facially inconsistent because, in its findings, the Legislature concedes that sex offenders are “unamenable to existing mental illness treatment modalities.” FLA. STAT. § 916.31 (Supp. 1998). Yet, under the Act, the offender is indefinitely committed for treatment. See *id.*

183. See *id.* § 916.32(9).

184. Blakey, *supra* note 169, at 229 (arguing that repeat sexual offenders who are “mad” are somewhat morally culpable, but less culpable than ordinary, completely sane persons).

185. See Stephen J. Morse, *Excusing the Crazy: The Insanity Defense Reconsidered*, 58 S. CAL. L. REV. 777, 782 (1985).

186. *In re Linehan*, 518 N.W.2d 609, 615 (Minn. 1994) (Gardebring, J., dissenting) (reviewing Minnesota’s sexual predator commitment statute). For a full discussion of *Linehan*, see Hammel, *supra* note 50, at 786-91.

Florida, however, does not recognize lack of volitional control as an insanity defense.¹⁸⁷ Florida follows the M'Naghten Rule, under which only those defendants who do not recognize right from wrong may be acquitted by reason of insanity.¹⁸⁸ This rule has been widely criticized for not recognizing lack of volitional control as a defense.¹⁸⁹ In fact, the American Law Institute changed its Model Penal Code to include lack of volitional control as part of the insanity defense because volitional control is necessary to establish criminal culpability.¹⁹⁰ Thus, Florida's new statutory scheme of committing offenders only after they have been punished is consistent with its long-standing rule that lack of volitional control does not diminish an offender's criminal culpability. The issue is whether the legislative judgment that a sexual predator is a responsible moral agent (and therefore criminally culpable) can be reconciled with the legislative judgment that the same offender suffers from a mental abnormality such that he or she should be separated from society by civil commitment.

(c) *The Hybrid, "Bad-and-Mad" Approach*

The sexual predator acts recently enacted in Florida, Kansas, and other states create a new category of mental illness—a "mental abnormality" that its proponents claim satisfies the "mental illness" component of civil commitment without diminishing the culpability

187. See, e.g., *Hall v. State*, 568 So. 2d 882, 885 (Fla. 1990); *Mines v. State*, 390 So. 2d 332, 337 (Fla. 1980); *Wheeler v. State*, 344 So. 2d 244, 245 (Fla. 1977). Florida statutes, however, recognize lack of volitional control as a mitigating factor to be considered before the imposition of a death sentence. See FLA. STAT. § 921.141(6)(b) (1997) (stating that one legitimate mitigating factor occurs when "[t]he capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance"); see also *id.* § 921.141(6)(f) (stating that another mitigating factor occurs when "[t]he capacity of the defendant to appreciate the criminality of his or her conduct or to conform his or her conduct to the requirements of law was substantially impaired").

188. See, e.g., *Hall*, 568 So. 2d at 885; *Gurganus v. State*, 451 So. 2d 817, 820-21 (Fla. 1984); *Wheeler*, 344 So. 2d at 245; *Campbell v. State*, 227 So. 2d 873, 877 (Fla. 1969).

189. See Michelle Migdal Gee, Annotation, *Modern Status of Test of Criminal Responsibility-State Cases*, 9 A.L.R. 4th 526, 529-30 (1981) (noting that the M'Naghten Rule has been widely criticized).

190. See *Wheeler*, 344 So. 2d at 245. The American Law Institute's Model Penal Code provides:

(1) A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law.

(2) As used in this Article, the terms 'mental disease or defect' do not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct.

MODEL PENAL CODE § 4.01 (1985) (emphasis added).

aspect of criminal jurisprudence.¹⁹¹ Such statutory schemes attempt to justify first punishing the convicted sex offender and, afterwards, civilly committing him. A similar Minnesota statute provides for involuntary commitment of "sexual psychopathic personalities" in lieu of criminal confinement, but does not treat this condition as a defense to a criminal charge, as occurs with legal mental insanity.¹⁹² In defending this Minnesota statute, one commentator noted:

According to received doctrine, [a "sexual psychopath"] must be placed in one of two legal categories: "mad" or "bad." Under the "mad" approach, if [a "sexual psychopath"] were determined to be mentally ill and dangerous, the state could civilly commit him. Under the "bad" approach, if [a "sexual psychopath"] were convicted of a crime, the state could imprison him. Thus, the law sets up a paradigm of extremes: people who do terrible things to others are either sick or evil. The difficulty is that, in reality, mental illness and wickedness do not exist as two opposite conditions with nothing in between. Rather, "mad" and "bad" are the ends of a continuum upon which moral culpability varies according to the degree of madness or badness in any one individual. Some offenders are not easily classified as "mad" or "bad," because they are, to some degree, a little of both, that is, they are culpable for their conduct to some extent, but also to some extent inculpable due to the role that mental illness played in their conduct.¹⁹³

Others have echoed this middling view of sexual predation, concluding that sex offenders are culpable because they know right from wrong, but are rightfully committed because they "may be less able than others to control their anti-social behavior."¹⁹⁴ Though these arguments are subjective conclusions concerning the nature of sexual predation and the relative culpability to be appropriately assigned in light of that perceived nature, these commentators argue that these are normative decisions that state legislatures are authorized to make.¹⁹⁵

V. CONCLUSION

The Jimmy Ryce Act and other similar sexual predator commitment acts are legislative attempts to resolve the recurring abhorrence of sexual violence. Since the nature of sexual predation is unknown, and perhaps unknowable, the states are authorized to make normative judgments as to the culpability of these offenders. How-

191. See, e.g., Robert Teir & Kevin Coy, *Approaches to Sexual Predators: Community Notification and Civil Commitment*, 23 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 405, 425-26 (1997).

192. See Blakey, *supra* note 169, at 240.

193. *Id.* at 28-29.

194. Teir & Coy, *supra* note 191, at 425-26.

195. See *id.*

ever, the Constitution imposes certain constrictions upon the state in punishing its citizens. The history and substance of the Act unfortunately reveal that the Act may be a punitive measure aimed at a particularly loathed class of criminals. Moreover, the Florida Legislature failed to articulate, and subsequent history has not revealed, a theory under which a sexually violent predator is culpable for an action, and at the same time, mentally incapable of volitional control. The Legislature's failure to define the scope of sex offenders' culpability undermines the moral foundation of our criminal justice system while similarly distorting the role of civil commitment. Nonetheless, the Act at least facially requires a legitimate mental abnormality. The challenge for the courts in the future will be to develop this definition on a case-by-case basis to truly limit the scope of the Act to persons with bona fide mental illnesses. The courts must fashion an interpretation of the Jimmy Ryce Act that will require some malfunction of the offender's mind so that he may not be committed solely due to his past acts for which he has already been punished. Moreover, to prevent substitution of the criminal justice system with civil commitment, the definition must insure that the malfunction is distinguishable from mere criminal behavior. In this manner, the courts will help insure that the criminal justice system will be neither skewed nor averted.