INTRODUCTION

Involuntary civil commitment for the mentally ill has a long history in American law. In recent years, however, there has been a proliferation of statutes providing for the indefinite civil commitment of persons convicted of sex offenses following their prison sentences. The Supreme Court upheld the constitutionality of Kansas's Sexually Violent Predator Act ("SVPA") in *Kansas v. Hendricks*, thus implicitly upholding similar statutory schemes in other states and paving the way for the adoption of such laws throughout the nation.

Although the Kansas SVPA covers only a narrow subset of criminal offenders (those who commit violent sexual offenses), many commentators have observed that the statute and the *Hendricks* decision have the potential to be extended to other types of offenders, and perhaps even to all criminals. These concerns have become all the more salient in recent times, as fear of terrorism is likely to foster a political climate conducive to the expansion of broader mechanisms for social control of dangerous persons.

This comment begins in Part I by providing a detailed examination of the *Hendricks* decision. Part II discusses the potential implications of *Hendricks*. As many scholars have recognized, *Hendricks* provides no doctrinal limitation on the expansion of civil commitment, leaving open the possibility that civil commitment could be utilized as...
a mechanism to incapacitate a broad range of offenders. Part III explores justifications for the expansion of civil commitment. I argue that, if accompanied by appropriate procedural safeguards, an expanded civil commitment system may be a desirable alternative to our current retributive criminal justice system. Parts IV and V discuss possible constitutional limitations on the indefinite expansion of involuntary civil commitment. These limitations are examined in the context of a hypothetical representing the broadest possible expansion of involuntary civil commitment. I assume that a state, called State X, passes a statute that discards its current system of criminal justice and replaces it with a system predicated on involuntary civil commitment for virtually all types of violent offenders. I discuss both the legal authority that may support State X's decision to pass this statute, and the potential constitutional impediments to its enactment.

I. THE KANSAS SVPA AND THE HENDRICKS DECISION

The Kansas SVPA provides for the indefinite civil commitment of persons adjudged to be "sexually violent predators." The Act defines a "sexually violent predator" as "any person who has been convicted of or charged with a sexually violent offense and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in the predatory acts of sexual violence." "Mental abnormality" is defined as a "congenital or acquired condition affecting the emotional or volitional capacity which predisposes the person to commit sexually violent offenses in a degree constituting such person a menace to the health and safety of others." The Supreme Court addressed the constitutionality of the Kansas SVPA in *Kansas v. Hendricks.* Leroy Hendricks, a diagnosed pedophile, was the first person committed pursuant to the Kansas SVPA. Hendricks had a long history of conviction and incarceration for sexual offenses against children, beginning in 1955. In 1984, Hendricks was convicted of taking "indecent liberties" with two thirteen-year-old boys. He served ten years of his sentence, and was scheduled for release to a halfway house. Shortly before his release, the State filed a petition in state court seeking to civilly commit Hendricks under the Kansas SVPA. The state court reserved ruling based on the Act's

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4 KAN. STAT. ANN. § 59–29a02(a) (1994).
5 Id.
6 KAN. STAT. ANN. § 59–09a02(b) (1994).
8 Id. at 353–54.
9 Id.
10 Id. at 354.
constitutionality, and concluded that there was probable cause to support a finding that Hendricks was a sexually violent predator.\textsuperscript{11}

Hendricks then requested a jury trial to determine whether he qualified as a sexually violent predator. During the trial, Hendricks testified to his long history of sexual molestation.\textsuperscript{12} He admitted that he "[couldn’t] control the urge" to molest children, and that the only way he could ensure that he would not sexually abuse children in the future was "to die."\textsuperscript{13} The jury found beyond a reasonable doubt that Hendricks was a sexually violent predator, and the trial court ordered him committed.\textsuperscript{14}

Hendricks appealed his commitment to the Kansas Supreme Court. He challenged the Act’s constitutionality on three bases. First, he argued that a commitment based on a "mental abnormality" rather than a clinically recognized "mental illness" violated substantive due process.\textsuperscript{15} Second, he claimed that his commitment violated the Double Jeopardy Clause of the Fifth Amendment because it punished him twice for the same behavior.\textsuperscript{16} Third, he argued that the SVPA violated the Ex Post Facto clause because it was passed after his conviction and increased the punishment for his criminal behavior.\textsuperscript{17}

The Kansas Supreme Court held that the Act’s definition of "mental abnormality" did not satisfy the "mental illness" requirement in the civil commitment context, and thus the Act violated Hendricks’ substantive due process rights.\textsuperscript{18}

The U.S. Supreme Court reversed the holding of the Kansas Supreme Court.\textsuperscript{19} Justice Thomas, speaking for a five-person majority, rejected each of Hendricks’ arguments. Justice Thomas began by addressing the substantive due process challenge. He found that the SVPA did not run afoul of substantive due process because the requirement of a pre-commitment finding of "mental abnormality" or "personality disorder" is consistent with the requirements imposed by other civil commitment statutes that were previously upheld by the Court.\textsuperscript{20} According to Justice Thomas, the finding of a clinically recognized "mental illness" is not a prerequisite to commitment. Rather, legislatures have the authority to provide legal definitions for mental health concepts that do not "mirror" those provided by the

\textsuperscript{11} Id.
\textsuperscript{12} Id. at 354–55.
\textsuperscript{13} Id. at 355.
\textsuperscript{14} Id. at 355–56.
\textsuperscript{15} Id. at 356.
\textsuperscript{16} Id.
\textsuperscript{17} Id.
\textsuperscript{18} Id. at 356.
\textsuperscript{19} Id. at 356.
\textsuperscript{20} Id. at 358.
medical profession. Moreover, Justice Thomas observed, Hendricks was diagnosed as suffering from pedophilia, which is classified by the psychiatric profession as a serious mental disorder.

Remarkably, eight of the nine Justices essentially agreed with Justice Thomas's conclusion that the Kansas SVPA's definition of "mental abnormality" did not violate substantive due process.

Justice Thomas went on to consider whether the Kansas SVPA violated the Double Jeopardy or Ex Post Facto Clauses. Both of these claims turned on the same issue: whether or not confinement under the Act constitutes punishment. If the government is not punishing an individual, the Double Jeopardy and Ex Post Facto Clauses do not apply. Justice Thomas began by noting that Hendricks bore a heavy burden of establishing that the Act is indeed punitive, since the Kansas legislature labeled it as a civil statute. Justice Thomas then cited several reasons why Hendricks failed to satisfy this burden.

First, as a "threshold matter," the Act did not implicate either retribution or deterrence, which are the two primary goals of the criminal justice system. According to Justice Thomas, the Act was not retributive because it did not seek to impose culpability for prior criminal conduct. Instead, it merely used prior criminal conduct for "evidentiary purposes." The Act was also not functioning as a deterrent, because persons covered under the Act by definition suffer from a "mental abnormality" that prevents them from exercising adequate control over their behavior. Therefore, they cannot be deterred. Additionally, the conditions of confinement for persons committed under the Act mirrored those of state mental institutions, rather than prisons.
Second, Justice Thomas rejected the argument that the potentially indefinite duration of the confinement evidenced the state’s punitive intent. Justice Thomas found that the duration of confinement was appropriately linked to the express purpose of the Act, which was to confine the person until his mental abnormality no longer made him a danger to others.30

Third, Justice Thomas found that the state’s use of procedural safeguards traditionally reserved for criminal trials did not render the statutory proceedings criminal rather than civil.31 Instead, Justice Thomas viewed these safeguards as demonstrating that Kansas carefully limited the statute to apply to a narrow class of dangerous individuals.32

Finally, Justice Thomas rejected the argument that the Act was punitive because it did not offer legitimate treatment. He noted that incapacitation is a legitimate end of civil law.33 Therefore, the fact that the Act’s “overriding concern” is the continued “segregation of sexually violent offenders” was consistent with the conclusion that the Act is civil rather than punitive.34 Moreover, Justice Thomas observed, the Act included a provision stating that the state had an obligation to provide treatment to individuals committed under the Act, suggesting that treatment might be an ancillary purpose of the Act.35 The fact that treatment procedures were not in place at the time Hendricks was committed did not render the proceedings punitive, because states have wide discretion in developing treatment regimens.36

II. IMPLICATIONS OF THE HENDRICKS DECISION

The Hendricks decision represents a substantial extension of civil commitment jurisprudence without providing a cogent limiting principle.37 The Kansas SVPA, upheld by the Supreme Court, is far more broad than traditional civil commitment statutes in the sense that it allowed commitment to be predicated on a finding of “mental abnormality” rather than a clinically recognized mental illness. As Professor Stephen Morse argues, a careful examination of Kansas’s defi-

30 Id. at 363–64.
31 Id. at 364.
32 Id.
33 Id. at 365–66.
34 Id. at 366.
35 Id. at 367.
36 Id. at 367–68.
37 See Note, Involuntary Commitment of Violent Sexual Predators, 111 HARV. L. REV. 259, 266 (1997) (stating that the Hendricks decision is remarkable because “the majority extended the reach of its due process civil commitment jurisprudence without offering a cogent limiting principle”).
nition of mental abnormality reveals that it is really not a definition of mental abnormality at all. Again, the Act defines "mental abnormality" as a "congenital or acquired condition affecting the emotional or volitional capacity which predisposes the person to commit sexually violent offenses in a degree constituting such person a menace to the health and safety of others." This definition is so broad that, if the reference to "sexually violent offenses" is deleted, it applies to all behavior, both normal and abnormal.

To illustrate this concept, consider the following hypothetical offered by Thomas J. Weilert, Hendricks' attorney. Weilert posed a scenario in which an individual convicted of robbery is scheduled for parole from prison. A victim's rights group lobbies the Kansas legislature, which passes the Violent Predator Act. The Act defines "violent predator" as "any person who has been convicted of or charged with a violent offense and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in the predatory acts of violence." In turn, "mental abnormality" is defined as a "congenital or acquired condition affecting the emotional or volitional capacity which predisposes the person to commit violent offenses in a degree constituting such person a menace to the health and safety of others." A person found to be a "violent predator" may be confined indefinitely, until it is shown that his mental abnormality no longer makes him a danger to others.

As Weilert's hypothetical demonstrates, the Hendricks decision validates a civil commitment scheme that could potentially be expanded to apply to classes of offenders besides sexual offenders. Given the

50 Morse writes:

[T]he type of mental abnormality criterion adopted by Kansas and other states, which the Court accepted, is not only over-inclusive; it also places essentially no non-responsibility limit on commitment. The criterion is so broad that it applies to any person who commits sexual violence, and, more generally, it applies to all behavior, normal and abnormal alike. It is not a definition of abnormality at all.


41 Morse, supra note 38, at 1043.


43 Id. at 17.

44 Id. at 18.

45 Id.

46 See also Fred Cohen, The Law and Sexually Violent Predators—Through the Hendricks Looking Glass, in THE SEXUAL PREDATOR: LAW, POLICY, EVALUATION AND TREATMENT 1-8 (Anita Schlank & Fred Cohen eds., 1999) (suggesting that, under Hendricks, it would be doctrinally feasible to enact a statute that provides for the involuntary civil commitment of pathological gamblers); John Kip Cornwell, Understanding the Role of the Police and Parens Patriae Powers in Involuntary Civil Commitment Before and After Hendricks, 4 PSYCHOL. PUB. POL’Y & L. 377, 400-01 (1998) (suggesting that arsonists and women suffering from acute "premenstrual dysphoric disorder" could be committed based on a mental abnormality formulation similar to that approved in Hendricks);
broadness of Kansas’s definition of mental abnormality, the decision suggests that virtually all offenders likely to engage in a pattern of repetitive criminal conduct could be committed indefinitely.\textsuperscript{47} This is especially true when one considers that many researchers predict that a sizable percentage of the current prison population may be diagnosed as having antisocial personality disorder, which would seem to qualify as a “mental abnormality” under Kansas’s definition.\textsuperscript{48}

III. JUSTIFICATIONS FOR THE EXPANSION OF CIVIL COMMITMENT

The \textit{Hendricks} decision provides no doctrinal limitations on a state’s ability to expand the use of involuntary civil commitment as a mechanism for control of dangerous persons. Many scholars have criticized the \textit{Hendricks} decision as an unjustified expansion of civil commitment, and have argued that further expansion is dangerous to our civil liberties and should be curtailed.\textsuperscript{49}

In my view, this criticism is misplaced. Civil commitment, if accompanied by appropriate procedural safeguards, could provide a viable and in fact desirable alternative to our current system of criminal justice.

A primary goal of any civil commitment system is to incapacitate dangerous persons.\textsuperscript{50} Theoretically, the state’s power to incapacitate dangerous persons in order to protect others is difficult to debate.\textsuperscript{51}

\[\text{Mara Lynn Krongard, A Population At Risk: Civil Commitment of Substance Abusers After Kansas v. Hendricks, 90 CAL. L. REV. 111 (2002) (arguing that \textit{Hendricks} broadened the scope of civil commitment and that substance abusers are particularly at risk of commitment).}\]
\[\text{See Introduction, in THE SEXUAL PREDATOR, supra note 46, at ix-x (noting the concern among certain mental health professionals and legal researchers that the broad definition of “mental abnormality” may eventually be applied to include all criminals).}\]
\[\text{See AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 648 (4th ed. 1994) (reporting that various studies have found the prevalence of antisocial personality disorder in clinical settings to be as high as 30%, while even higher prevalence rates have been noted in substance abuse treatment settings and prison or forensic settings); Eric S. Janus & Lisbeth J. Nudell, Defending Sex Offender Commitment Cases, in THE SEXUAL PREDATOR, supra note 46, at 3–1, 3–9 (describing the diagnostic criteria for antisocial personality disorder as “exceedingly broad” and noting that the diagnosis could apply to up to 80% of all prisoners); P. Moran, The Epidemiology of Antisocial Personality Disorder, 34 SOC. PSYCHIATRY & PSYCHIATRIC EPIDEMIOL. 231, 234 (1999) (estimating that 40%–60% of the male prison population can be diagnosed with antisocial personality disorder).}\]
\[\text{See, e.g., Krongard, supra note 46, at 163 (criticizing the \textit{Hendricks} decision as a dangerous precedent that places individual liberty interests at substantial risk); Stephen J. Morse, Neither Desert Nor Disease, LEGAL THEORY 265, 277 (1999) (stating that the potential expansion of the civil commitment scheme approved in \textit{Hendricks} threatens civil liberty).}\]
\[\text{See Paul H. Robinson, Punishing Dangerousness: Cloaking Preventive Detention as Criminal Justice, 114 HARV. L. REV. 1429, 1432–33 (2001) (“The goal of providing [protection from dangerous persons] underlies traditional . . . commitment systems that detain persons who are dangerously mentally ill or who have contagious diseases.”).}\]
\[\text{See id. at 1432. (“It is difficult to deny that a society ought to be able to defend itself against persons who will cause serious harm.”).}\]
Indeed, it can be argued that the very purpose of government is to ensure the safety and security of its citizens. Of course, every individual citizen has a constitutionally protected liberty interest, but that interest can be overridden by the state's interest in ensuring community safety. Therefore, if certain individuals are sufficiently dangerous, the state has a duty to incapacitate them for the common good.

Incapacitation is recognized as a goal of the criminal justice system as well. However, incapacitation is better served by civil commitment than by our present system of criminal justice. This is because the criminal justice system also serves the goal of retribution, which inherently conflicts with the principle of incapacitation. Incapacitation seeks to protect the community from dangerous persons by physically confining or otherwise disabling them. Retribution, popularly referred to as "just deserts," seeks to inflict punishment upon those who have committed wrongful acts in order to restore the "moral balance." As Professor Paul Robinson explains, the theoretical bases of retribution and incapacitation diverge because retribution focuses on punishing past wrongdoing, while incapacitation focuses on preventing future harm. This theoretical divide has serious practical implications. If the focus of the criminal justice system is incapacitation, this suggests that punishment should be determined on the basis of factors that accurately predict future dangerousness. On the other hand, if the focus is on retribution, punishment should be set according to the seriousness of the crime and the offender's blameworthiness. Moreover, a sufficiently dangerous individual may

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52 This rationale has been used to justify incapacitation of dangerous persons outside the civil commitment context. For example, the Supreme Court has sanctioned pretrial detention without bail of potentially dangerous offenders. United States v. Salerno, 481 U.S. 739 (1987). See also Jacobson v. Massachusetts, 197 U.S. 11, 27-29 (1905) (upholding legislated mass vaccinations and approving forced quarantines even if the people targeted show no signs of illness). The Jacobson Court commented:

[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 freed 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.

Id. at 26.

53 Kansas v. Hendricks, 521 U.S. 346, 373 (1997) (Kennedy, J., concurring) ("[I]ncapacitation is a goal common to both the criminal and civil systems of confinement . . . .").


55 Id.; see also Ford v. Wainwright, 477 U.S. 399, 408 (1986) (defining retribution as "the need to offset a criminal act by a punishment of equivalent 'moral quality'").

56 Robinson, supra note 50, at 1438-41.

57 See id. Robinson rejects the notion, reflected in the Model Penal Code, that incapacitation and retribution can be harmonized. See American Law Institute, Model Penal Code: Proposed Official Draft § 1.02(2) (1962) (listing the purposes of sentencing, including inca-
be incapacitated although he deserves no punishment, and, likewise, a person may be punished because he deserves it even though he is not dangerous.

The irreconcilable differences between the theories of retribution and incapacitation clearly suggest that the criminal justice system should not be in the business of doing both. If faced with a choice between the two, the criminal justice system should focus upon retribution rather than incapacitation. After all, the criminal justice system is designed to determine criminal responsibility and punish individuals found guilty of committing criminal acts; it is not designed to accurately assess dangerousness. A civil commitment system, on the other hand, is designed to assess dangerousness—a determination of dangerousness is one of the prerequisites to commitment. Therefore, civil commitment is the appropriate mechanism to further the goal of incapacitation.

Most people would insist that retribution is a fundamentally important principle that must be satisfied by the state. However, not everyone shares this view. Many believe that man's desire for vengeance can never provide a justification for punishment by the state. If retribution is not a proper justification for state-inflicted punishment, this suggests that the criminal justice system itself may be unnecessary. Of course, the criminal justice system is also said to satisfy the goal of deterrence, meaning that punishment of one person discourages others from committing the same act. However, recent scholarship has cast serious doubt on the validity of the deterrence principle. Therefore, both of the traditional justifications for crimi-

58 See Foucha v. Louisiana, 504 U.S. 71, 125 (1992) (noting that dangerousness is a prerequisite to civil confinement).
59 See, e.g., Furman v. Georgia, 408 U.S. 238, 308 (1972) (Stewart, J., concurring) ("The instinct for retribution is part of the nature of man, and channeling that instinct in the administration of criminal justice serves an important purpose in promoting the stability of a society governed by law.").
60 See R.A. DUFF, TRIALS AND PUNISHMENTS 295 (1986) (rejecting retribution as a legitimate justification for punishment because today's society fails to respect the autonomy of all individuals); GEORGE P. FLETCHER, RETHINKING CRIMINAL LAW 417 (1978) (suggesting that revenge-based retribution is an unworthy justification for punishment); Steven F. Huefner, Reservations About Retribution in a Secular Society, 2003 B.Y.U. L. REV. 973, 977-78 (2003) (arguing that retribution is both too broad and too narrow a justification for punishment); Paul H. Robinson, The Virtues of Restorative Processes, the Vices of "Restorative Justice", 2003 UTAH L. REV. 375, 377-78 (2002) (explaining that advocates of restorative justice believe that "just deserts"-based punishment is never an appropriate goal of the justice system).
61 See generally Paul H. Robinson & John M. Darley, The Role of Deterrence in the Formulation of Criminal Law Rules: At Its Worst When Doing Its Best, 91 GEO. L.J. 949 (2003) (arguing that criminal law does not deter under the conditions found in modern criminal justice systems, and expressing concern that lawmakers take the validity of deterrence for granted). Also, to the extent that there is a deterrent effect to punishment, the same effect, though unintended, should
nal punishment are at least open to question, so an alternative system of social control has some theoretical credibility.

Civil commitment actually has many advantages over criminal justice in terms of civil liberty. First, since dangerousness is the reason for confinement, the state must periodically review the offender’s dangerousness and release him if it is determined that he no longer poses a threat. Second, since commitment is not punitive, the condition of the offender’s detention should not be as harsh as the prevailing conditions in prisons. Third, since the offender is being detained for society’s benefit and not because he deserves punishment, the type of restraint he is subjected to should be the minimum necessary to ensure the public safety. If the individual can be sufficiently incapacitated by means other than commitment, such as community supervision or house arrest, then such other means should be used.

Fourth, those offenders who have conditions amenable to treatment can be treated more readily in a commitment setting than they can be in prison, and they also have a more plausible claim to treatment because it may reduce the length of their confinement. In fact, whereas rehabilitation coupled with retributive punishment has failed miserably, rehabilitation combined with incapacitation has the potential to be quite successful since the two goals are theoretically compatible.

Given these advantages, one may wonder why preventive civil commitment is so controversial. One reason has already been mentioned. Most people instinctually believe in the principle of retribution. Accordingly, most people believe that offenders should be punished according to what they deserve, no less and no more. Another major reason is that incapacitation has a major downfall—lack of predictive accuracy. Although a system based upon incapacitation should theoretically do a much better job of protecting community safety than one predicated on retribution, incapacitation requires that we have an accurate method of identifying those people

result from civil commitment, at least for people who are not entirely irrational or completely unable to conform their conduct to the law.

Robinson, supra note 50, at 1446.
Id.
Id. at 1447.
Id.
See Robert Martinson, What Works? Questions and Answers About Prison Reform, 35 PUB. INT. 22, 25, 49 (1974) (summarizing the results of hundreds of studies of rehabilitative programs in a prison setting, and concluding that “with few and isolated exceptions, the rehabilitative efforts that have been reported so far have had no appreciable effect on recidivism,” and that present strategies “cannot overcome, or even appreciably reduce, the powerful tendency for offenders to continue in criminal behavior”).

who are highly likely to engage in violence and who therefore can be justifiably confined. Many people are very skeptical of the ability of courts and psychiatrists to predict dangerousness accurately. For example, after surveying clinical studies, Professor Morse concludes that "the ability of mental health professionals to predict future violence among mental patients may be better than chance, but it is still highly inaccurate, especially if these professionals are attempting to use clinical methods to predict serious violence."  

Professor Morse is surely correct to point out the problems with predicting dangerousness. But these problems do not doom the expansion of civil commitment. Of course, we will never be able to predict human behavior with perfect accuracy. There will, as Morse points out, be many "false positives" when we confine people on the basis of dangerousness.  

However, this alone does not justify the complete abandonment of preventive detention. There have been many, many cases of perfectly innocent people being falsely convicted and sent to prison, or even executed. We accept the risk of erroneous conviction because we realize that no system is infallible, and because we believe that, on balance, society is better off having a justice system that occasionally punishes the innocent than having no justice system at all. We seek to minimize the risk of conviction by requiring the prosecution to prove guilt beyond a reasonable doubt. A preventive detention system could similarly raise the standard of proof and require the state to show a "high" or "extremely high" likelihood of future dangerousness.

Moreover, methods of predicting dangerousness have significantly improved over the years, and there is reason to believe that they can improve further with more research. Particularly, actuarial risk as-

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68 Id.
69 Id. A "false positive" refers to a person who would not commit further violent acts but is confined nonetheless.
70 See, e.g., Hugo Adam Bedau & Michael L. Radelet, Miscarriages of Justice in Potentially Capital Cases, 40 STAN. L. REV. 21, 36, 173–79 (1987) (summarizing the results of an extensive study of 350 erroneous convictions in capital cases, and concluding that in forty percent of the cases an innocent person was sentenced to death and, in twenty-three of these cases, the execution was actually carried out).
71 State supreme courts have already done this with regard to the standard necessary to justify civil commitment of sexual predators. For example, the Minnesota Supreme Court has held that proof that the individual is "highly likely" to engage in future acts of violence justifies civil commitment. In re Linehan, 557 N.W.2d 171, 181 (Minn. 1996). Similarly, the Washington Supreme Court stated that sexual offenders subject to commitment are those whose "likelihood of re-offense is extremely high." In re Young, 857 P.2d 989, 1003 (Wash. 1993) (en banc).
72 Hanson explains: [R]ecent years have seen significant advances in risk assessment procedure . . . . There is no longer any serious debate about whether general criminal recidivism can be predicted among general criminal populations. Those offenders most likely to reoffend have been identified by risk factors such as a history of criminal behavior, antisocial personality/psychopathy, a young age, antisocial peers, and procriminal attitudes . . .
assessments have proven to be especially promising, and have yielded significant correlations with sexual, violent, and general recidivism. Therefore, skeptics of risk assessment may overestimate the potential number of “false positives” that would result in a system of preventive detention. Additionally, many studies assessing the accuracy of dangerousness predictions may overestimate the number of “false positives.” This is because studies of recidivism usually measure recidivism in terms of subsequent convictions within a given time frame. However, much crime goes undetected, so many individuals identified by studies as “false positives” may have actually committed violent acts during the duration of the study, or may commit violent acts after the study period ends.

Finally, the phenomenon of “false positives” seems less troubling when one considers the type of individuals who may comprise the false positives. A system of involuntary civil commitment would feature incapacitation as its central mechanism for promoting community safety. However, civil confinement would be a last resort, reserved for only those people who have the highest likelihood of committing violent acts. While the number of people involuntarily committed under the system would undoubtedly be much greater than the number of people currently committed, I envision a system in which the vast majority of offenders are dealt with through the use of less intrusive means. For offenders who are dangerous but not highly dangerous, supervised release or house arrest may be sufficient to ensure community safety. Nonviolent offenders would be dealt with exclusively through the use of non-physical restraints such as fines, restitution, community service, and community-based treatment. Restorative justice principles and processes would play a much more important role in the system than it does in our current crimi-

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R. Karl Hanson, What Do We Know About Risk Assessment?, in THE SEXUAL PREDATOR, supra note 46, at 8–1, 8–2.

73 The difference between actuarial and clinical assessments has been explained as follows: “In the clinical method the decision-maker combines or processes information in his or her head. In the actuarial or statistical method the human judge is eliminated and conclusions rest solely on empirically established relations between data and the condition or event of interest.” Robyn M. Dawes et al., Clinical Versus Actuarial Judgment, 243 SCIENCE 1668, 1668 (1989).

74 See Eric S. Janus & Robert A. Prentky, Forensic Use of Actuarial Assessment with Sex Offenders: Accuracy, Admissibility, and Accountability, 40 AM. CRIM. L. REV. 1443, 1453–59 (2003) (summarizing the results of meta-analyses, and concluding that actuarial assessments of risk are superior to clinical assessments and should be admissible in civil commitment proceedings for sexually violent predators).

75 Criminologists refer to the difference between recorded crime and actual crime as the “dark figure” of crime. See generally Albert D. Biderman & Albert J. Reiss, Jr., On Exploring the “Dark Figure” of Crime, 374 ANNALS AM. ACAD. POL. & SOC. SCI. 1 (1967) (discussing the conflicting views of “realists” and “institutionalists” with respect to the “dark figure” of crime).
nal justice system.\textsuperscript{76} In short, the system would be more cost-effective and less harsh than the criminal justice system, and would have the potential to promote greater community safety. Yes, there would be false positives committed unjustifiably, but the false positives would not be the check forgers, petty thieves,\textsuperscript{77} or minor drug offenders. Rather, they would be the one-time murderers, rapists, and child molesters who are confined indefinitely despite their lack of continuing dangerousness. It would be difficult for a retributivist to argue with this result.

It is time to face the reality that our incarceration-based criminal justice system is not working. The United States imprisons more of its citizens than any other country in the Western world, yet has among the highest crime rates.\textsuperscript{78} We continue to punish people for violating the law by throwing them in prison, yet our streets become no safer in the process. "The instinct for retribution" may be "part of the nature of man,"\textsuperscript{79} but we must begin to consider the possibility that our instinct has led us astray. We need to start thinking creatively about alternatives to our criminal justice system. A system of involuntary civil commitment for violent and dangerous offenders, combined

\textsuperscript{76} For an argument that restorative justice should replace retributive punishment, see John Braithwaite, \textit{A Future Where Punishment is Marginalized: Realistic or Utopian?}, 46 UCLA L. REV. 1727 (1999). Braithwaite defines restorative justice as the "process of bringing together the stakeholders (victims, offenders, communities) in search of a justice that heals the hurt of crime, instead of responding to hurt with more hurt." \textit{Id.} at 1728–29. This process uses techniques such as "victim-offender mediation, sentencing circles, and family-group conferences . . . ." Robinson, supra note 60, at 375. Studies have shown that restorative processes can both be effective in reducing recidivism and improving people's perception of the fairness of the adjudication system. \textit{Id.} at 376. Braithwaite believes that restorative justice should be used as a first resort, and deterrence and incapacitation should be used as back-up strategies when it fails. Braithwaite, supra, at 1742. I believe that restorative processes can be very effective for dealing with particular types of offenses, and I agree that it should be the first resort for many minor offenses and property-based offenses. However, restorative processes are inappropriate for serious violent offenses, and these types of offenders should be incapacitated for the safety of the community.

\textsuperscript{77} See Rummel v. Estelle, 445 U.S. 263 (1980). In \textit{Rummel}, the defendant had been convicted under a Texas "recidivist" statute for obtaining $120.75 by false pretenses. Because he had two prior felony convictions—one for fraudulent use of a credit card to obtain $80 worth of goods or services, and the other for passing a forged check in the amount of $28.36—he was sentenced to mandatory life imprisonment. \textit{Id.} at 266. The Supreme Court held that Rummel's sentence did not amount to cruel and unusual punishment in violation of the Eighth Amendment. \textit{Id.} at 285.


\textsuperscript{79} Furman v. Georgia, 408 U.S. 238, 308 (1972) (Stewart, J., concurring).
with non-penal sanctions and restorative processes for others, may provide a viable alternative. The following sections explore whether such a system would comport with the Constitution.

IV. STATE X HYPOTHETICAL

A. Civil Commitment Act

In order to examine the limits of a state's authority to expand its use of civil commitment, I present the following hypothetical, which is intended to represent the maximum possible expansion of civil commitment.

Assume that State X passes a statute, called the Civil Commitment Act, which effectively abolishes its present system of criminal justice and replaces it with a system of social control predicated upon involuntary civil commitment for the majority of offenders. The statute adopted by State X provides that all persons currently incarcerated who meet the state's definition of mental abnormality, which is analogous to Kansas's definition (absent the words "sexually violent"), will be indefinitely committed, subject to periodic review on a yearly basis.

The Act further provides that, following the time the statute goes into effect, "serious criminal offenses" (defined as felonies and Class A misdemeanors) will be converted into "commitment predicates." When a person is charged with a commitment predicate, a state proceeding is initiated in which a jury is required to determine whether the person committed the act, and if so, whether the person has a mental abnormality that renders him or her a danger to the health and safety of others. If both questions are answered in the affirmative, the person will be indefinitely committed subject to periodic review on a yearly basis. Persons who do not qualify for commitment under the Act will be dealt with through the use of non-penal sanctions such as fines, probation, reparation, and, where appropriate, outpatient treatment programs. A person who is committed pursu-

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80 Contrast this statute and the absence of the phrase "sexually violent" with the statute at issue in Kansas v. Hendricks, 521 U.S. 346 (1997).

81 This approach would be similar to the "depenalization model" of criminal justice that several European countries have moved toward in recent decades. The depenalization model is based on the premise that the regular criminal justice system, with its focus on imprisonment, is overly harsh and ineffective for dealing with non-serious offenses. In place of incarceration, non-serious offenders are subjected to sanctions including fines, community service, and reparation to the victim. Additionally, cases are diverted from the criminal justice system into alternative systems such as administrative proceedings, civil courts, and mediation courts. See Máximo Langer, From Legal Transplants to Legal Translations: The Globalization of Plea Bargaining and the Americanization Thesis in Criminal Procedure, 45 HARV. INT’L L.J. 1, 60–61 (2004) (describing the features of the depenalization model).
ant to the Act can only be released if, at the time of the yearly review, a team of mental health professionals and a judge determine that he or she no longer suffers from a mental abnormality that renders him or her a danger to others.

B. Federalism and Criminal Justice

Apart from the Hendricks decision itself, support for State X's authority to implement the Act is found in the notion of federalism. Generally speaking, federalism may be defined as "the relationship between two constitutionally grounded kinds of political communities and governments, typically a central or national government and local or regional governments." In the United States, federalism involves the relationship between the federal government and the various state governments. In recent years, the Supreme Court has waged a revolution in the jurisprudence of federalism that has reemphasized the nature of our government as one of dual sovereignty and transferred power from the national government to the state governments.

A full review of federalism is beyond the scope of this paper. For the purposes of this paper, it suffices to note that the concept of federalism imposes significant limitations on the federal government's ability to intervene in state criminal justice processes. The Supreme Court has, in recent years, demonstrated a growing reluctance to allow the federal government to infringe upon the authority of the states, particularly in areas where states have historically had sovereignty.

Justice Black provided perhaps the most widely regarded explanation of federalism in his opinion in Younger v. Harris. According to Justice Black, our system of federalism requires:

a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways.

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83 Id. at 95 n.4 (stating that the Supreme Court, under Chief Justice Rehnquist, "has engaged in a far-reaching reappraisal of the scope of Congressional authority and the balance of powers between the national government and the states") (quoting Linda Greenhouse, Will the Court Reassert National Authority?, N.Y. Times, Sept. 30, 2001 (Week in Review), at 14).
86 Id. at 44.
In *Younger*, Justice Black invoked the concept of federalism to prevent federal courts from issuing injunctions in pending state criminal prosecutions. The Court's reluctance to interfere in state criminal justice systems is evident in other contexts as well. For example, in *Patterson v. New York*, the Court found that states have wide discretion to define the elements of a crime and affirmative defenses. The *Patterson* Court noted that "preventing and dealing with crime is much more the business of the States than it is of the Federal Government."  

The Supreme Court has also limited the ability of Congress to interfere with state criminal justice systems. In *United States v. Lopez* and *United States v. Morrison*, Justice Rehnquist established a new framework to analyze Congress's authority to legislate under the Commerce Clause. Under this new framework, Congress may not regulate non-economic, violent crime based solely on its aggregate effect on interstate commerce. In *Lopez*, the Court considered the constitutionality of the Gun-Free School Zones Act of 1990, which made it a federal offense "for any individual knowingly to possess a firearm . . . at a place that the individual knows, or has reasonable cause to believe, is a school zone." Justice Rehnquist, writing for the majority, held that Congress did not have the authority under the Commerce Clause to regulate the possession of guns in school zones. Justice Rehnquist found that the Act was a criminal statute having nothing to do with commerce or any type of economic enterprise.

In *Morrison*, the Court addressed the constitutionality of the Violence Against Women Act, which provided a federal civil remedy for victims of gender-motivated violence. Applying the framework articulated in *Lopez*, Justice Rehnquist's majority opinion held that the Act could not be upheld under the Commerce Clause even though it was supported by extensive legislative findings regarding the effects

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88 Id. at 201; see also Smith v. Robbins, 528 U.S. 259, 273 (2000) (emphasizing the Supreme Court's "established practice, rooted in federalism, of allowing the States wide discretion, subject to the minimum requirements of the Fourteenth Amendment, to experiment with solutions to difficult problems of policy" in the area of criminal justice, and collecting cases supporting this proposition).
90 529 U.S. 598 (2000).
91 Id. at 617.
of gender-motivated violence on interstate commerce. According to Justice Rehnquist, regulation and punishment of intrastate violence has always been the province of the States . . . Indeed, we can think of no better example of the police power, which the Founders denied the National Government and reposed in the States, than the suppression of violent crime and vindication of its victims.

The Supreme Court's federalism jurisprudence suggests that the federal courts and Congress should not interfere with a state's criminal justice process, which has traditionally been considered an area of state sovereignty. Under our federalist structure, states retain wide authority to fashion their criminal justice systems as they see fit. Taken to its logical extreme, the concept of federalism may be read to support the thesis that a state could abolish its criminal justice system and replace it with an alternative system of social control featuring involuntary civil commitment as its primary mechanism.

V. STATE X HYPOTHETICAL: CONSTITUTIONAL LIMITATIONS ON THE EXPANSION OF CIVIL COMMITMENT

The foregoing analysis of federalism in the area of criminal justice suggests that states have wide authority to fashion the rules of their criminal justice systems, without interference from federal courts and Congress. State X's decision to implement a new system of social control should be upheld as valid, unless a challenger can demonstrate that it runs afoul of some affirmative, fundamental principle of justice rooted in the Constitution. The Hendricks decision virtually forecloses a challenge to State X's definition of mental abnormality. This section of the comment explores the basis for other types of potential constitutional challenges to the Civil Commitment Act.

95 Morrison, 529 U.S. at 614.
96 Id. at 618. Recent precedent suggests that the Supreme Court is unwilling to further extend the reasoning of Lopez and Morrison and thereby entirely overturn its Commerce Clause jurisprudence. Last term, the Court held that the federal Controlled Substances Act could be applied to intrastate users and growers of marijuana for medical purposes as authorized by California's Compassionate Use Act. Gonzales v. Raich, 125 S. Ct. 2195 (2005). The Court distinguished Lopez and Morrison on two grounds. First, those cases involved a challenge to a particular statute or provision in its entirety, while the plaintiffs in Gonzales sought to "excise individual applications of a concededly valid statutory scheme." Id. at 2209. Second, the activities regulated by the Controlled Substances Act are "quintessentially economic," whereas those activities at issue in Lopez and Morrison were not. Id. at 2211. The Court rejected California's attempt to isolate the intrastate cultivation, use, and possession of marijuana for medical purposes as beyond the reach of federal power, because this activity could have a substantial effect on the interstate market for marijuana. Id. at 2212.
97 The Gonzales case suggests that the Supreme Court may be unwilling to extend federalism far enough to support this type of experimentation.
98 See supra Part II.
A. Retribution and Deterrence

The goals of retribution and deterrence are reserved solely for the criminal justice system, and cannot be adopted by a civil commitment system.\(^99\) Therefore, in order for the Civil Commitment Act to be constitutional, State X must make clear that it is officially abandoning the goals of retribution and deterrence. This suggests an important argument that can potentially limit the expansion of involuntary civil commitment. It is possible to argue that a state cannot abolish its criminal justice system because the state has an obligation to further the goals of retribution and deterrence. According to this reasoning, by abolishing its criminal justice system and replacing it with a civil commitment system, State X has abdicated its responsibility to punish and deter lawbreakers, and this is unjustifiable.

If valid, this argument would effectively doom the Civil Commitment Act, because it would place State X in an impossible predicament. State X could not legitimately use civil commitment as a mechanism for retribution and deterrence, but State X has a responsibility to further the goals of retribution and deterrence, so it could not abolish its criminal justice system.

The main problem with the argument relates back to federalism. Federalism teaches that states have broad authority to design and implement their criminal justice systems.\(^100\) This authority would seemingly allow a state to decide that it will not have a criminal justice system at all. Such a decision would be valid unless it can somehow be shown that states are constitutionally required to have a criminal justice system. Since the goals of retribution and deterrence are reserved solely for the criminal justice system,\(^101\) the question really becomes whether retribution and deterrence are constitutionally required aspects of the state police power.

Retribution and deterrence are, of course, not mentioned anywhere in the Constitution. The Bill of Rights does include several provisions relating to crime. For example, the Fifth Amendment provides that “[n]o person shall be held to answer for a capital, or otherwise infamous crime” unless on indictment of a grand jury, “be subject for the same offense to be twice put in jeopardy of life or limb,” or “compelled in any criminal case to be a witness against himself.”\(^102\) The Sixth Amendment guarantees that, in all criminal trials, the accused has the right to a “speedy and public trial, by an impartial

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\(^{100}\) See *supra* Part IV.B.

\(^{101}\) See *supra* note 99 and accompanying text.

\(^{102}\) U.S. CONST. amend. V.
jury," "to be informed of the nature and cause of the accusation," "to be confronted with . . . witnesses," and "to have the Assistance of Counsel for his defence." And finally, the Eighth Amendment provides that no "cruel and unusual punishments" shall be inflicted. Therefore, the writers of the Constitution clearly envisioned that some system of criminal justice would be in place.

However, the original Bill of Rights applied only to the federal government, and not to the states, so it cannot be argued that the Constitution requires the states to have a system of criminal justice. Moreover, as a historical matter, it is implausible to contend that the writers of the Constitution intended for the states to have anything akin to a contemporary criminal justice system, because there simply was nothing similar to a modern system at the time of the founding and it would have been impossible for the founders to contemplate such a system. For instance, there were no public prosecutors at the time of founding. Prosecution was effected by either the crime victim, the constable, or a private attorney acting as temporary public advocate. Professional police also did not exist. Substantive criminal law had limited significance because juries decided the law on an ad hoc basis. Finally, penitentiaries had not yet been adopted in this country, so incarceration was rare. In short, the basic features of the modern criminal justice system did not exist at the time of the founding. For these reasons, it is implausible to argue that the original Constitution required the states to create criminal justice systems to satisfy the goals of retribution and deterrence.

Most provisions of the Bill of Rights have since been incorporated by the states through the due process clause of the Fourteenth

103 U.S. CONST. amend. VI.
104 U.S. CONST. amend. VIII.
105 See Barron v. Mayor & City Council of Balt., 32 U.S. (7 Pet.) 243, 247 (1833) (stating that "[t]he constitution was ordained and established by the people of the United States for themselves, for their own government, and not for the government of the individual states").
107 See generally PETER CHARLES HOFFER, LAW AND PEOPLE IN COLONIAL AMERICA 80-89 (1992) (describing broadly the criminal law and procedure of colonial America).
108 Id. (explaining the varying methods of criminal procedure in early colonial America).
109 Id.
111 See David J. Rothman, Perfecting the Prison: United States, 1789-1865, in THE OXFORD HISTORY OF THE PRISON 111, 114-15 (Norval Morris & David J. Rothman eds., 1995) (recounting the history of the penitentiary in the United States and stating that incarceration was not widely used in America until the 1820s and 1830s).
Amendment. It can perhaps be argued that, although the original Constitution did not contemplate state systems of criminal justice, the drafters of the Fourteenth Amendment did, and therefore the Constitution, as altered by the Fourteenth Amendment, requires that the states have a system of criminal justice in place that satisfies the goals of retribution and deterrence. In 1868, when the Fourteenth Amendment was adopted, public prosecutors, police forces, and prisons were common, and the criminal justice system was similar to the system in place today. However, this argument is not persuasive when one considers the intended purpose of the Fourteenth Amendment. The Fourteenth Amendment prohibited states from depriving “any person of life, liberty, or property, without due process of law.” The purpose of this language is clearly to limit the state’s police powers. Therefore, the more proper interpretation of the Fourteenth Amendment is that it was intended to allow the courts to place limitations on state criminal justice systems that had emerged, by requiring that they abide by “due process of law” when depriving persons of their liberty. From this perspective, the Fourteenth Amendment cannot be read to somehow constitutionalize the modern criminal justice system and the goals that it serves. Ultimately then, State X is not mandated by the Constitution to adopt any particular penological goals, and can choose to abandon retribution and deterrence and focus on incapacitation instead.

B. Procedural Due Process

The Fourteenth Amendment provides that no state shall “deprive any person of life, liberty, or property, without due process of law.”

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112 See In re Winship, 397 U.S. 358, 382 n.11 (1970) (Black, J., dissenting) (stating that, since adoption of the Fourteenth Amendment, the Supreme Court has held almost all of the provisions of the Bill of Rights applicable to the states, and citing cases).

113 See ALLEN ET AL., supra note 106, at 72–73 (noting that the criminal justice system of 1868 and the contemporary criminal justice system share most basic features).

114 U.S. CONST. amend. XIV, § 1.

115 See Hurtado v. California, 110 U.S. 516, 534–35 (1884) (interpreting the phrase “due process of law” in the Fourteenth Amendment to restrain the actions of the states to the same extent that Fifth Amendment due process restrains the federal government).

116 Justice Kennedy recognized that the Constitution does not require adoption of any particular penological theory in his concurrence in Harmelin v. Michigan, 501 U.S. 957 (1991). This case dealt with the principle of “proportionality” in criminal sentencing. In concluding that a mandatory life sentence for possession of cocaine did not violate the proportionality principle, Justice Kennedy observed that state legislatures have the responsibility to make fundamental choices concerning the objectives of the penal system. Id. at 999. The Eighth Amendment “does not mandate adoption of any one penological theory.” Id. Accordingly, “federal and state criminal systems have accorded different weights at different times to the penological goals of retribution, deterrence, incapacitation, and rehabilitation.” Id.

117 U.S. CONST. amend. XIV, § 1.
The Supreme Court has long recognized that civil commitment represents a substantial deprivation of liberty that requires due process protections. In *Addington v. Texas*, the Supreme Court identified the standard of proof that must be satisfied before a state can constitutionally commit a mentally ill person. The appellant in *Addington* was indefinitely committed to a mental hospital pursuant to Texas law after his mother filed a commitment petition. Addington had a long history of temporary confinements for mental and emotional disorders, had been involved in several assaultive episodes, and had caused substantial property damage to his home and his parents' home.

At trial, the state offered the opinions of two psychiatric experts, who testified that Addington suffered from psychotic schizophrenia and was probably dangerous to himself and others. Addington conceded that he suffered from a mental illness, but argued that there was no substantial basis to conclude that he was dangerous. The trial court instructed the jury to determine whether, based on "clear, unequivocal and convincing evidence," Addington was mentally ill and required hospitalization "for his own welfare and protection or the protection of others." Addington objected to these instructions, contending that the trial court should have employed the "beyond a reasonable doubt" standard of proof. The Texas Court of Civil Appeals reversed on the standard of proof issue. The Texas Supreme Court reversed the Court of Appeals and reinstated the trial court's judgment, finding that a "preponderance of the evidence" standard of proof was sufficient to satisfy due process requirements.

In a unanimous decision, the Supreme Court held that the "clear and convincing evidence" standard is the proper standard of proof for civil commitment proceedings. In *Addington*, the Court examined the continuum of standards of proof and the cases with which they are associated. In ordinary civil suits, the "preponderance of the evidence" standard applies because "society has a minimal concern with the outcome of such private suits," and the litigants equally "share the

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118 See, e.g., Foucha v. Louisiana, 504 U.S. 71, 80 (1992) (stating that "[f]reedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action").
120 Id. at 420.
121 Id. at 420–21.
122 Id. at 421.
123 Id.
124 Id.
125 Id. at 421–22.
126 Id. at 422.
127 Id.
risk of error." The Court then compared these civil cases with criminal cases, which mandate the "beyond a reasonable doubt" standard because the interests of the defendant are so important that they have historically been protected by "standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment." 

The Court recognized that "civil commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection." For this reason, and because civil commitment can result in substantial stigma to the committed person, the individual's interest in the outcome of a civil commitment proceeding is sufficiently important to justify a standard higher than mere preponderance of the evidence. However, the Court rejected Addington's contention that due process requires that the "beyond a reasonable doubt standard" be used in civil commitment proceedings.

The Court began by emphasizing that the state has a legitimate interest in civil commitment pursuant to both its parens patriae and police power, thus distinguishing civil commitment from criminal incarceration. Next, the Court identified several reasons why the standard of proof in a civil commitment proceeding should differ from the standard in a criminal prosecution. First, a civil commitment proceeding is not punitive in nature. Second, the "beyond a reasonable doubt standard" has traditionally been reserved for criminal cases, and should not be extended to other types of cases. This standard reflects the desire to minimize the risk of error, even if some guilty persons go free. Even though erroneous confinement should be avoided, the risk of erroneous confinement is not as serious because of review and observation by mental health professionals, and because family and friends will ensure that erroneous commitment will be detected. Finally, the inquiry in a civil commitment proceeding differs significantly from the inquiry in a criminal trial in that

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128 Id. at 423.
129 Id.
130 Id. at 425.
131 Id. at 427.
132 Id. at 426. The Court refers to the state's interests under its parens patriae powers as the interest "in providing care to its citizens who are unable because of emotional disorders to care for themselves." Id. The Court also notes that the state "has authority under its police power to protect the community from the dangerous tendencies of some who are mentally ill." Id. In criminal cases, a state acts under the authority of its police powers, but its parens patriae powers are not implicated.
133 Id. at 428.
134 Id.
135 Id.
136 Id. at 428–29.
it requires evaluation and diagnosis by mental health experts.137

"Given the lack of certainty and the fallibility of psychiatric diagnosis, there is a serious question as to whether a state could ever prove beyond a reasonable doubt that an individual is both mentally ill and likely to be dangerous."138 Therefore, the Court settled on the intermediate standard of proof, requiring the state in a civil commitment proceeding to prove mental illness and dangerousness by "clear and convincing evidence."139

The implications of Addington for State X are clear. In order to commit an individual under the Civil Commitment Act, the state must prove by clear and convincing evidence that the individual suffers from a mental abnormality and is presently dangerous.140 These procedural due process requirements should not be overly difficult to comply with, and so long as they are met, Addington poses no barrier to commitment under the Act. First, given the Act's expansive definition of mental abnormality, it should not be difficult for State X to produce experts willing to testify that a given individual suffers from a mental abnormality. Second, State X should have little difficulty proving dangerousness by clear and convincing evidence in most cases. Those offenders currently in prison have a history of criminal convictions, and other individuals who will be targeted are those that have committed a violent act which qualifies as a "commitment predicate." As a practical matter, the factfinder is likely to credit past violence as evidence of present dangerousness, unless there is compelling evidence that the individual is unlikely to continue to commit violent acts in the future.

One question that will arise is the standard of proof required for the determination of whether an individual actually committed a "commitment predicate." In this respect, the Act adds an additional

137 Id. at 429.
138 Id.
139 Id. at 431–33. The Court noted that, consistent with the essence of federalism, states are free to adopt more stringent standards of proof if they wish. Id. at 431–32.
140 There may be additional procedural requirements that would have to be satisfied prior to commitment. The Supreme Court has not precisely delineated all of the procedural protections that are necessary in the commitment context. Sexual predator statutes typically include extensive procedural requirements that must be met before an individual can be committed indefinitely. For example, the Kansas SVPA provides a wide array of procedural protections typical of the criminal rather than the civil process, including a probable cause determination, a trial to determine beyond a reasonable doubt whether the individual in question is a sexually violent predator, assistance of counsel and an examination by mental health professionals for indigents at public expense, the right to present and cross-examine witnesses, and the opportunity to review documentary evidence presented by the state. See Kansas v. Hendricks, 521 U.S. 346, 352–53 (1997) (listing the procedural protections included in the Kansas SVPA). Of course, the Civil Commitment Act would be modeled after existing sexual predator statutes, and would therefore include extensive procedural requirements more than sufficient to satisfy due process standards in the commitment context.
layer of inquiry onto the civil commitment proceeding that is more akin to the inquiry required in a criminal trial in that it is a factual investigation focusing upon whether the individual committed the act alleged.\[141\] Therefore, there is a good argument that the "proof beyond a reasonable doubt" standard should apply in making the determination of whether the individual committed a "commitment predicate." On the other hand, the other rationales cited in Addington still apply in this context. A proceeding under the Act is civil, rather than punitive in nature. Also, it can still be contended that the risk of erroneous commitment is not as serious as the risk of erroneous conviction.\[142\]

C. Substantive Due Process

The Supreme Court in Hendricks emphatically rejected the argument that commitment under the Kansas SVPA violated Hendricks' substantive due process rights.\[143\] Various commentators have noted that the Court's decision in this area disregarded precedent established just a few years earlier in Foucha v. Louisiana.\[144\] Foucha was charged with aggravated burglary and illegal discharge of a firearm. The trial court found Foucha not guilty by reason of insanity.\[145\] Louisiana law provided that a defendant in a criminal case found not guilty by reason of insanity be committed to a mental hospital unless he could prove he was not dangerous.\[146\] Louisiana law further provided that the individual would remain committed until he was able

\[141\] According to the Court, the basic issue in criminal cases involves a "straightforward factual question—did the accused commit the act alleged?" Addington, 441 U.S. at 429.

\[142\] This argument is somewhat more difficult to make in this context than it was in Addington. The Court in Addington reasoned that review by professionals and concern by family members would ensure that erroneous commitments would be detected. 441 U.S. at 428-29. It may be easy to detect an erroneous commitment when dealing with a person alleged to be suffering from a serious mental illness like schizophrenia, the symptoms of which are easily detectable. However, given the amorphousness of the definition of mental abnormality, the chances of professionals concluding that a conviction was erroneous would appear to be slimmer. Also, there will probably be less sympathy for persons who have committed serious violent offenses. Moreover, given the required finding of a "commitment predicate," stigma that attaches to commitment under the Act is likely to be greater than the stigma that ordinarily attaches to being committed for mental illness. Accord Krongard, supra note 46, at 130 (arguing that "civil commitment for the purpose of protecting the public bears a stronger resemblance to criminal incarceration than to commitment for the benefit of the committed" in the context of Kansas v. Hendricks).


\[144\] 504 U.S. 71 (1992). See, e.g., Krongard, supra note 46, at 130 (noting that the Court in Hendricks reiterated the holding of Foucha but failed to establish why sex offenders committed pursuant to the SVPA should be treated differently than the appellant in Foucha, who was diagnosed with antisocial personality disorder).

\[145\] Foucha, 504 U.S. at 74.

\[146\] Id. at 73.
to prove at release proceedings that he was not dangerous. If found dangerous, the individual would be returned to the mental hospital whether or not he was mentally ill.\textsuperscript{147}

Foucha was committed pursuant to this procedure. Four years later, the superintendent of the mental hospital where Foucha was confined recommended that he be discharged or released. Pursuant to state law, the trial judge appointed a "sanity commission" to determine if Foucha remained dangerous.\textsuperscript{148} One of the doctors testified that Foucha probably suffered from a "drug induced psychosis" when committed but that he had recovered from that condition, and that he showed no signs of psychosis or neurosis.\textsuperscript{149} The doctor further testified that Foucha had antisocial personality disorder, an untreatable mental condition.\textsuperscript{150} The commission's report concluded that Foucha's mental illness was in remission, but was unable to certify that Foucha would not be a danger to himself or others if released.\textsuperscript{151} Following the hearing, the court found that Foucha was dangerous and ordered that he be returned to the mental hospital.\textsuperscript{152} The state Court of Appeals and Supreme Court both affirmed.

The United States Supreme Court reversed, finding that Foucha's continued commitment violated due process. Justice White, writing for the majority, relied on \textit{Jones v. United States}\textsuperscript{153} and \textit{O'Connor v. Donaldson}\textsuperscript{154} for the proposition that an insanity acquittee must be released when he is no longer mentally ill or no longer dangerous.\textsuperscript{155} The testimony at Foucha's release proceedings established that he no longer suffered from a mental illness.\textsuperscript{156} Therefore, one of the prerequisites for civil commitment was no longer present. Justice White rejected the state's reliance on Foucha's antisocial personality disorder as justification for his continued confinement. According to Justice White, the state's rationale would allow it to indefinitely confine any insanity acquittee who had a personality disorder that may lead to criminal conduct, as well as any convicted criminal.\textsuperscript{157} Such a system

\textsuperscript{147} Id.
\textsuperscript{148} Id. at 74.
\textsuperscript{149} Id. at 75.
\textsuperscript{150} Id.
\textsuperscript{151} Id. at 74–75.
\textsuperscript{152} Id. at 75.
\textsuperscript{153} 463 U.S. 354 (1983).
\textsuperscript{154} 422 U.S. 563 (1975).
\textsuperscript{155} The Court in \textit{Jones} held that "(t)he committed acquittee is entitled to release when he has recovered his sanity or is no longer dangerous." 463 U.S. at 368. In \textit{Donaldson}, the Court held that it violated due process for a state to continue to confine a mentally ill person who was no longer dangerous. 422 U.S. at 575.
\textsuperscript{156} Antisocial personality disorder is classified as a personality disorder, which is distinct from a mental illness. \textit{American Psychiatric Association}, supra note 48, at 648.
\textsuperscript{157} \textit{Foucha}, 504 U.S. at 82–83.
"would also be only a step away from substituting confinements for dangerousness for our present system which, with only narrow exceptions and aside from permissible confinements for mental illness, incarcerates only those who are proved beyond reasonable doubt to have violated a criminal law."\(^{158}\)

The Court's opinion in *Foucha* could be interpreted as requiring civil commitment to be predicated upon a finding of mental illness, as opposed to a personality disorder. Of course, the Court specifically rejected this interpretation in *Hendricks*. Therefore, the question must be asked whether anything in *Foucha* survives *Hendricks*. The Court in *Hendricks* did not expressly overrule *Foucha*. Rather, it found the Kansas SVPA to be consistent with *Foucha*, which it recognized as holding that involuntary civil commitment statutes are constitutional if confinement takes place "pursuant to proper procedures and evidentiary standards."\(^{159}\) Although this reasoning seems somewhat disingenuous, Justice O'Connor's concurrence in *Foucha* suggests a possible basis for reconciliation of the two cases. Justice O'Connor agreed with the majority's conclusion that Louisiana's commitment procedure for insanity acquittees violated due process, but she wrote separately to emphasize that more narrowly drawn statutes providing for confinement of insanity acquittees may pass constitutional muster.\(^{160}\) Thus, "it might therefore be permissible for Louisiana to confine an insanity acquittee who has regained sanity if... the nature and duration of detention were tailored to reflect pressing public safety concerns related to the acquittee's continuing dangerousness."\(^{161}\)

Consistent with Justice O'Connor's opinion, the Kansas SVPA could be regarded as sufficiently narrow to satisfy due process requirements, in that it applies only to a small subclass of sexually violent offenders. Under this interpretation, Foucha could not be confined on the basis of antisocial personality disorder because this disorder does not sufficiently narrow the class of persons subject to confinement, but Hendricks could be confined on the basis of pedophilia because he fit into a sufficiently narrow subset of offenders and his detention was tailored to reflect pressing public safety concerns related to his continuing dangerousness. On this theory, pure preventative detention based on dangerousness is unacceptable if not sufficiently limited.

Assuming this interpretation of *Foucha*’s continuing vitality is correct, the question that immediately arises is what the limiting mecha-

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\(^{158}\) Id. at 83.


\(^{160}\) *Foucha*, 504 U.S. at 86–87 (O'Connor J., concurring).

\(^{161}\) Id. at 87–88.
nism is that makes preventive detention on the basis of dangerousness constitutionally acceptable. In other words, what is the principle upon which Foucha and Hendricks can be distinguished? Justice Thomas's opinion in Hendricks suggested that the operative limiting mechanism is lack of control: "The precommitment requirement of a 'mental abnormality' or 'personality disorder' is consistent with the requirements of . . . other statutes that we have upheld in that it narrows the class of persons eligible for confinement to those who are unable to control their dangerousness."\(^{162}\)

The Court further confused the lack of control requirement in Kansas v. Crane,\(^{165}\) a case arising from another commitment under the Kansas SVPA. Crane was a convicted sex offender who was diagnosed with exhibitionism and antisocial personality disorder.\(^{164}\) Following a jury trial, the Kansas district court ordered that Crane be civilly committed as a sexual violent predator pursuant to the Kansas SVPA.\(^{165}\) The Kansas Supreme Court reversed, holding that due process requires a finding that the defendant cannot control his dangerous behavior.\(^{166}\)

On appeal, the Supreme Court discussed and ultimately constitutionalized the lack of control requirement. The Court concluded that Hendricks did not require that an individual have a total or absolute lack of control in order to be civilly committed as a sexually violent predator.\(^{167}\) On the other hand, neither did Hendricks allow commitment absent any lack of control determination. Instead, such a determination was necessary to distinguish "a dangerous sexual offender subject to civil commitment" from other dangerous people who should be dealt with through the criminal justice system.\(^{168}\)

After stating that a lack of control finding was necessary to distinguish sexual predators from other types of offenders, the Court proceeded to define the standard to be used. According to the Court, "lack of control" can be demonstrated by "proof of serious difficulty in controlling behavior."\(^{169}\) This proof, viewed in the context of the case, "must be sufficient to distinguish the dangerous sexual offender whose serious mental illness, abnormality, or disorder subjects him to civil commitment from the dangerous but typical recidivist convicted in an ordinary criminal case."\(^{170}\)

\(^{162}\) Hendricks, 521 U.S. at 358.
\(^{164}\) Id. at 411.
\(^{165}\) Id.
\(^{166}\) Id.
\(^{167}\) Id.
\(^{168}\) Id. at 412.
\(^{169}\) Id. at 413.
\(^{170}\) Id.
Finally, the Court addressed the import of the distinction between mental abnormality characterized by an "emotional impairment" and a mental abnormality involving a "volitional impairment." The Court noted that most dangerous sexual offenders who are civilly committed will, like Hendricks, have a volitional impairment that makes it particularly difficult for them to control their behavior. However, the Hendricks Court did not draw a clear distinction between volitional and purely emotional mental abnormalities. The Court likewise declined to consider whether confinement based solely on "emotional" abnormality would be constitutional.

In declining to consider the constitutionality of confinement based on emotional abnormality alone, the Court sidestepped a fundamentally important issue regarding the constitutional scope of civil commitment. Recall that the Court in Foucha held that Foucha could not be confined on the basis of dangerousness combined with a diagnosis of antisocial personality disorder. The Court in Crane ultimately failed to determine whether Crane, who also suffered from antisocial personality disorder, could be committed, and instead vacated and remanded to the state court. However, the Court's reasoning does suggest that an individual with antisocial personality disorder, or any other "emotional" or "cognitive" impairment, could be constitutionally committed so long as that impairment caused a sufficiently serious control problem. Therefore, the Court stripped Foucha of much of its significance without explicitly acknowledging that it was doing so, and moved a step closer to sanctioning the system of pure preventive confinement that the Foucha Court was worried about.

The foregoing analysis suggests that the lack of control standard will ultimately not impose a significant constitutional barrier to State X's implementation of its civil commitment system. The Court in Crane constitutionalized the lack of control standard as a prerequisite to civil commitment, but ultimately left the precise meaning of lack of control open. Therefore, states have substantial discretion to define the lack of control standard, and it is unlikely that the Court will strike down state definitions as unconstitutional. Given this, State X could commit a person suffering from, for instance, antisocial personality disorder, so long as there is a finding that the person has

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171 Id. at 414–15.
172 Id. The Kansas Supreme Court found that Hendricks forbids the commitment of any person suffering from an emotional impairment but not a volitional impairment.
173 See Morse, supra note 38, at 1033 ("Crane's vague definition of lack of control and its recognition that the states retain considerable leeway to define mental abnormality, and, presumably, also to define lack of control, imply that most state definitions will be constitutionally acceptable.").
substantial difficulty controlling his behavior. Such a commitment would most likely be upheld as constitutional notwithstanding *Foucha*.

Moreover, as a practical matter, the lack of control standard is unlikely to impose much limitation on commitment from the perspective of the factfinder. The primary evidence that a state will put on to support a finding of lack of control will be evidence of prior convictions for violent offenses, along with psychiatric testimony establishing that the individual sought to be committed is likely to continue offending in the future. Ultimately, the factfinder will probably credit past violent behavior both as an accurate predictor of dangerousness and evidence of an inability to control behavior. Because the persons that State X is likely to target under the Civil Commitment Act will be repeat offenders with a history of violent and antisocial behaviors, the factfinder will probably have little difficulty finding the requisite “proof of serious difficulty in controlling behavior,” and indeed, the lack of control determination may well collapse into the dangerousness determination.

**D. Right to Treatment**

The Court’s most definitive statement regarding the constitutional right to treatment in the civil commitment context was announced in *Youngberg v. Romeo*. Romeo was a mentally retarded individual committed to a state facility in Pennsylvania. Romeo was injured several times as a result of his own violence as well as attacks by other residents. His mother filed suit on his behalf under 42 U.S.C. § 1983, claiming that the facility was violating his constitutional rights under the Eighth and Fourteenth Amendments by failing to institute proper procedures to prevent injuries to him and failing to

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174 Indeed, courts after *Crane* have upheld the involuntary commitment of sexual offenders with antisocial personality disorder. For example, in *Adams v. Bartow*, 330 F.3d 957, 962–63 (7th Cir. 2003), the Seventh Circuit upheld commitment of a sexual offender suffering from antisocial personality disorder based upon a finding that he was “substantially probable” to commit another sexually violent offense given his long history of sexually violent crimes, non-sexual crimes and antisocial behavior, failure under supervision, denial of responsibility, refusal to participate in treatment programs, and sex offense recidivism. This record was sufficient for the trial court to find that Adams suffered from a mental disorder that distinguished him from the “‘typical recidivist convicted in an ordinary criminal case.’” *Id.* at 963 (quoting *Crane*, 534 U.S. at 413).


176 *Crane*, 534 U.S. at 413.


178 *Id.* at 310.

provide him with proper treatment programs for his mental retardation. The Court found that Romeo had a "constitutionally protected liberty interest in safety and freedom from restraint," and recognized that treatment may be necessary to safeguard against violations of that liberty interest. Therefore, the Court concluded that the state was required "to provide minimally adequate or reasonable training to ensure safety and freedom from undue restraint." However, the Court was careful to limit its holding to the specific facts of Romeo's case, and refused to announce a general constitutional right to treatment.

Youngberg makes clear that there is a constitutional right to treatment in certain circumstances, but the Court's decision is vague as to what circumstances are included. If the Court were to recognize a general right to treatment for civilly committed persons, this would provide the basis for a serious challenge to the Civil Commitment Act. The Act allows for the commitment of dangerous offenders suffering from mental abnormalities, like antisocial personality disorder, that are untreatable. Obviously, if a person with an untreatable condition is committed and there is a constitutional right to treatment, the basis for that commitment is constitutionally problematic. In such instances, commitment would seem to be pure preventive detention, which the Court has consistently rejected, because the committed individual would never have the opportunity to be released.

The Hendricks Court was forced to address this problem because the Kansas Supreme Court had determined that treatment was not possible for people with Hendricks' condition. Justice Thomas initially suggested that commitment solely for the purpose of incapacitation is constitutionally acceptable. However, he went on to say that Hendricks' condition was in fact treatable and that treatment was an "ancillary goal" of the Kansas SVPA. Therefore, Justice Thomas

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180 Romeo, 457 U.S. at 310–11.
181 Id. at 318.
182 Id. at 319.
183 Id. at 318.
184 See Foucha v. Louisiana, 504 U.S. 71, 75 (1992) (describing antisocial personality disorder as a condition that is not a mental disease and is untreatable).
185 See Kansas v. Hendricks, 521 U.S. 346, 372 (1991) (Kennedy, J., concurring) (warning that "the practical effect of the Kansas law may be to impose confinement for life"); John Kip Cornwell, supra note 46, at 404 ("If...a state may confine a 'mentally abnormal' individual without regard to the availability or efficacy of psychiatric treatment, his detention may become, in effect, a life sentence.").
186 See Hendricks, 521 U.S. at 365 (quoting the Kansas Supreme Court, In re Hendricks, 912 P.2d 129, 136 (Kan. 1996)).
187 Id. at 365–66.
188 Id. at 366.
avoided fully answering the question of whether truly untreatable persons can be committed.

Ultimately then, the Supreme Court has not provided answers to the crucial questions of whether there is a right to treatment in the civil commitment context and whether a person with an untreatable mental disorder or abnormality can be committed. However, Justice Thomas’s reasoning in Hendricks certainly suggests that it would be unlikely for the Civil Commitment Act to be struck down on this basis. Additionally, the dissent in Hendricks explicitly stated that its opinion would not “preclude a State from deciding that a certain subset of people are mentally ill, dangerous, and untreatable, and that confinement of this subset is therefore necessary.”\footnote{Id. at 390 (Breyer, J., dissenting).} Therefore, all nine Justices apparently believe that incapacitation alone justifies the commitment of dangerous persons with untreatable mental disorders. This logic can be extended to support State X’s scheme of involuntary commitment for all dangerous offenders with a “mental abnormality.”\footnote{KAN. STAT. ANN. § 59-09a02(b) (1994). Accord Cornwell, supra note 46, at 406 (stating that the willingness of both the majority and the dissent in Hendricks to allow a state to detain dangerous individuals with an untreatable mental disorder, “taken to the extreme, would allow states to declare entire classes of dangerous mentally ill individuals ‘untreatable’ and leave them to languish indefinitely in psychiatric hospitals”).}  

Alternatively, even if the Court were to find that State X must provide some degree of treatment, it surely seems permissible under Hendricks for State X to implement a civil commitment system that primarily seeks to incapacitate dangerous offenders but adopts treatment as an ancillary goal, where treatment is available. Moreover, even for those individuals suffering from conditions like antisocial personality disorder that are essentially incurable, State X could legitimately offer some form of treatment, such as behavioral modification therapy, that would satisfy the “minimally adequate” standard established in Youngberg.\footnote{Youngberg v. Romeo, 457 U.S. 307, 322 (1982) (holding that the Fourteenth Amendment mandates minimally adequate training for involuntary commission to a state institution).} This is especially true given the Court’s statement in Hendricks that “States enjoy wide latitude in developing treatment regimens.”\footnote{Hendricks, 521 U.S. at 368 n.4.}

E. Ex Post Facto and Double Jeopardy

The main debate between the majority and the dissent in Hendricks focused upon whether commitment under the Kansas SVPA was punitive and therefore violated the Ex Post Facto and Double
Jeopardy Clauses of the Fifth Amendment. The majority determined that the SVPA was not punitive because 1) the state disavowed any sort of punitive intent; 2) the Act did not implicate the goals of retribution or deterrence; 3) the length of confinement was linked to the purpose of the Act; 4) the state provided procedural safeguards and provided those committed under the Act with the same status as other persons who had been civilly committed; 5) confinement was limited to a small group of particularly dangerous individuals; 6) the Act recommended treatment when possible; and 7) the Act allowed release upon a showing that the individual is no longer dangerous or mentally impaired.

The dissent, in finding the SVPA punitive as applied to Hendricks, focused upon the role of treatment. Justice Breyer argued that the state had, in fact, conceded that Hendricks was treatable, and was therefore obligated to provide him with treatment. By failing to offer treatment to Hendricks until after his release from prison, and then failing to provide available treatment after incapacitating him, the state demonstrated a punitive intent. However, Justice Breyer carefully limited his opinion to the facts of Hendricks’ confinement, and did not suggest that the entire statute was punitive and therefore invalid.

Based upon the rationale of both the majority and dissent in Hendricks, the Civil Commitment Act would probably not be considered punitive, so long as the Act is modeled after the Kansas SVPA, establishes sufficient procedural safeguards, and provides some form of treatment to treatable individuals. However, there is a critical additional feature of the Civil Commitment Act that distinguishes it from the Kansas SVPA and any other statute that has been enacted in the United States. That feature is, of course, the provision abolishing State X’s present criminal justice system. The fact that the Civil Commitment Act essentially creates a system of social control intended to replace the criminal justice system significantly changes the analysis, because it suggests that State X is utilizing civil commitment to satisfy the goals that it had previously satisfied through its criminal justice system. If civil commitment entirely replaces incarceration, it

195 The double jeopardy clause provides that no person shall be "subject for the same offense to be twice put in jeopardy of life or limb..." U.S. CONST. amend. V. The Ex Post Facto Clause, U.S. CONST. art. I, § 10, cl. 1, "forbids the application of any new punitive measure to a crime already consummated." Cal. Dept. of Corrs. v. Morales, 514 U.S. 499, 505 (1995) (internal citations omitted).

194 Hendricks, 521 U.S. at 368–69.

195 Id. at 390–91 (Breyer, J., dissenting).

196 Id. at 390.
is much more difficult to argue that the state is not acting with a punitive intent, in which case commitment would be invalid. This is precisely what Justice Kennedy was concerned about in writing his concurrence in <i>Hendricks</i>. Justice Kennedy recognized that, although the Kansas SVPA is a civil statute, its practical effect may be to impose lifelong confinement. Justice Kennedy then discussed the different goals of the civil and criminal systems of confinement. While both systems share the common goal of incapacitation, "retribution and general deterrence are reserved for the criminal system alone." Therefore, civil commitment would not be justified if it became "a mechanism for retribution or general deterrence." Justice Breyer also voiced this same concern in the <i>Crane</i> opinion. He emphasized the constitutional importance of distinguishing a dangerous sexual offender subject to civil commitment from other dangerous persons who are more properly handled through criminal proceedings, and said that this distinction is necessary to prevent commitment from becoming a mechanism for retribution and deterrence.

Since State X is superseding its criminal justice system with a civil commitment system, there is a strong argument that its civil system is adopting the goals of the criminal justice system and becoming a mechanism for retribution and deterrence. This is perhaps the best argument for limiting the expansion of involuntary civil commitment. But, it is unclear whether it would command a majority of the Court, given the Court’s general deference to a state’s designation of a statute as civil. Therefore, a clear acknowledgement by State X that it is officially abandoning the goals of retribution and deterrence and entirely focusing upon incapacitation and treatment, where possible, would probably suffice to establish the constitutionality of the Act.

**F. Expanding Toward Preventive Detention**

The foregoing analysis demonstrates that there is little standing in the way of a massive expansion of civil commitment. <i>Addington</i> requires that a state abide by particular procedural requirements before civilly committing an individual, but these requirements can be satis-

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197 This rationale would directly apply only to incarcerated offenders, and not those who are committed after the Act goes into effect. There could be no ex post facto or double jeopardy issue with regard to the latter class of offenders because they were not previously punished for their offenses.

198 <i>Id.</i> at 372 (Kennedy, J., concurring).

199 <i>Id.</i> at 373.

200 <i>Id.</i>


202 <i>See supra</i> note 25 and accompanying text.
fied fairly easily.\(^{203}\) The *Hendricks* decision virtually forecloses challenges to civil commitment statutes based upon substantive due process, ex post facto and double jeopardy, or right to treatment.\(^{204}\) *Crane* seemingly provides a limiting principle by requiring the state to demonstrate "proof of serious difficulty in controlling behavior" as a prerequisite to commitment.\(^{205}\) However, close scrutiny of this standard reveals that it is nearly as vacuous as Kansas's definition of mental abnormality. Creative arguments can be made regarding retribution and deterrence, but these arguments appear to have little constitutional basis and probably would not be accepted by a majority of the Court.

Ultimately, what the State X hypothetical really represents is the culmination of a massive theoretical shift that is evident in the Supreme Court's civil commitment jurisprudence.\(^{206}\) In *Foucha*, the Court clearly rejected pure preventive detention on the basis of dangerousness. With the *Hendricks* decision, the Court did a one hundred eighty degree turn and came quite close to sanctioning the very system it had denounced in *Foucha*.\(^{207}\) Although the Court took a couple of steps back in *Crane*, given the unwillingness of the Justices to impose any meaningful substantive limitations on the expansion of involuntary civil commitment, it seems as if the Court's approval of pure preventive detention—or at least preventive detention with treatment as an "ancillary goal"—could be on the horizon.

**CONCLUSION**

In the spirit of federalism, the Supreme Court has recognized that states should be allowed wide discretion to experiment and discover the most effective solutions to societal problems.\(^{208}\) Recently, states have begun to seek alternative methods to traditional criminal justice to deal with the pervasive problem of criminal violence. One of the methods that states have utilized is involuntary civil commitment. Thus far, civil commitment has been reserved for a small category of criminal offenders—those who are mentally ill and dangerous, and those who have a mental abnormality that renders them likely to en-

\(^{203}\) See *supra* Part V.B.
\(^{204}\) See *supra* Parts I and II.
\(^{206}\) Accord *Robinson*, *supra* note 50, at 1429 (noting that the focus of the justice system in recent years has shifted from punishing past crimes to preventing future violations).
\(^{207}\) See *supra* Part V.C.
\(^{209}\) See *Smith v. Robbins*, 528 U.S. 259, 273 (2000) (recognizing the Supreme Court's "established practice, rooted in federalism, of allowing the States wide discretion, subject to the minimum requirements of the Fourteenth Amendment, to experiment with solutions to difficult problems of policy").
gage in acts of sexual violence. However, Supreme Court jurisprudence suggests little constitutional impediment to the continued expansion of involuntary civil commitment.

In my view, an expanded civil commitment system should play a more central role in our society. The criminal justice system should be relegated to what the term "criminal justice" denotes—that is, it should be in the business of doing justice. Legislatures and courts should make an honest and legitimate attempt to affix punishments on the basis of the offender’s personal blameworthiness for the present offense, without any consideration of past criminality or future dangerousness. This would entail a rejection of “three-strikes” laws, habitual-offender statutes, and sentencing guidelines that increase sentences for offenders with criminal records.\textsuperscript{210} It would also entail far less use of incarceration and far more use of non-penal sanctions and restorative methods. Incapacitation should be entirely divorced from the criminal justice system.\textsuperscript{211} The goal of incapacitation is far better served by civil commitment than by criminal punishment.

Meanwhile, civil commitment should be expanded to allow for preventive detention on the basis of dangerousness. This system would encompass every violent offender whose term of incarceration has expired, as well as insanity acquittees and those found incompetent to stand trial. Every such offender would undergo a proceeding to determine his or her dangerousness, accompanied by appropriate procedural safeguards. Upon a finding of dangerousness, the individual would be civilly committed subject to periodic review, or, if appropriate, subjected to a less restrictive form of incapacitation.

Many people may be concerned about the ramifications of my proposal. For some, civil commitment invokes “images of crowded psychiatric hospitals filled with patients suffering from nebulous psychiatric ailments for which there is no available treatment because

\textsuperscript{210} See Robinson, supra note 50, at 1435 (describing these types of statutes as distortions of justice because they dramatically increase sentences under the guise of punishment when they are truly preventive detention mechanisms).

\textsuperscript{211} This proposal is similar to Professor Robinson’s suggestion that justice and prevention should be segregated into two systems, a criminal justice system focused upon imposing punishment proportionate to the offense, and a post-sentence civil commitment system focused upon incapacitating dangerous offenders. Id. at 1454-55. Professor Robinson’s proposal has not gone without criticism. Professor Morse argues that a system of preventive detention may be acceptable theoretically, but would be unjustifiable in practice because methods of predicting dangerousness are too inaccurate. Morse, supra note 38, at 1026-27 n.5. Professor Morse also contends that the protections of indefinite commitment would not effectively safeguard liberty. Id. However, Professor Morse argues elsewhere that pure preventive detention can be justified when the “risk of serious harm is grave.” Morse, supra note 49, at 266; see also Stephen J. Schulhofer, Two Systems of Social Protection: Comments on the Civil-Criminal Distinction, with Particular Reference to Sexually Violent Predator Laws, 7 J. CONTEMP. LEGAL ISSUES 69, 85 (1996) (suggesting that civil detention is permissible as a “gap-filler, to solve problems that the criminal process cannot address”).
they allegedly render the patients dangerous.\textsuperscript{212} So long as appropriate procedural protections are in place, such a system will not become a reality. Civil commitment will be reserved for a relatively small set of antisocial offenders who pose a serious threat to public safety. Is such a system really worse than the one we have now, where a person convicted of stealing $100 or writing a bad check can be incarcerated in brutal conditions for years and face the prospect of rape and violent death on a daily basis?\textsuperscript{213} Separating the criminal justice system from the civil commitment system by having the former focus on retribution and the latter on incapacitation can lead to greater justice and enhanced community safety. This type of dual system would not run afoul of the Constitution. Instead, it would reflect the spirit of federalism that the Constitution embraces.

\textsuperscript{212} Cornwell, \textit{supra} note 46, at 404.