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IN THE SHADOWLANDS: *FISHER* AND THE OUTPATIENT CIVIL COMMITMENT OF "SEXUALLY VIOLENT PREDATORS" IN TEXAS†

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I. INTRODUCTION

In Texas, people can face up to life in prison for breach of contract. The "contract" in question is one imposed on a "sexually violent predator" (SVP) in an outpatient civil commitment proceeding. The "breach" leading to a lengthy prison term could be something as seemingly innocuous as using a post office box or "sit[ting] and watching people."[1]

The recent Texas Supreme Court case, *In re Commitment of Fisher*,[2] provides a compelling view into the practical operation of the Texas SVP statute.[3] The case reflects a legal gray area (or "shadowland") created when civil proceedings take on punitive (quasi-criminal) functions, and will serve as a lens through which to examine the larger issue of civil commitment of sex offenders in Texas.

In contrast to SVP statutes in other states,[4] Texas law is unique in providing for outpatient commitment, as opposed to inpatient psychiatric hospitalization, for convicted sex offenders released from prison.[5] It also provides that a violation of any of the provisions of the SVP's outpatient commitment "contract" is a third-degree felony.[6] Although, as *Fisher* and other cases suggest,[7] the Texas statute may

1. Commitment of Fisher v. State, 123 S.W.3d 828, 840 (Tex. App.—Corpus Christi 2003) (en banc) (reproducing the Civil Commitment Requirements: Treatment and Supervision Contract), *rev'd sub nom. In re* Commitment of Fisher, 164 S.W.3d 637 (Tex. 2005), *cert. denied*, 126 S. Ct. 428 (2005).

2. *In re* Commitment of Fisher, 164 S.W.3d 637 (Tex. 2005), *cert. denied*, 126 S. Ct. 428 (2005).

3. TEX. HEALTH & SAFETY CODE ANN. §§ 841.001 to .150 (Vernon 2003 & Supp. 2006).

4. *See generally*, ARIZ. REV. STAT. ANN. §§ 36-3701 to -3717 (2003); CAL. WELF. & INST. CODE §§ 6600 to 6609.3 (West 1998); FLA. STAT. ANN. §§ 394.910 to .931 (West 2006); 725 ILL. COMP. STAT. ANN. 207/1 to 207/99 (West 2002 & Supp. 2006); IOWA CODE ANN. §§ 229A.1 to .16 (West 2006); KAN. STAT. ANN. §§ 59-29a01 to -29a21 (2005); MASS. GEN. LAWS ANN. ch. 123A §§ 1 to 16 (West 2003); MINN. STAT. ANN. §§ 253B.185(1) to (7) (West Supp. 2006); MO. ANN. STAT. §§ 632.480 to .513 (West 2006); N.J. STAT. ANN. §§ 30:4–27.24 to –27.38 (West Supp. 2006); N.D. CENT. CODE §§ 25-03.3-01 to -24 (2002 & Supp. 2005); 42 PA. CONS. STAT. ANN. §§ 6401 to 09 (West Supp. 2006); S.C. CODE ANN. §§ 44-48-10 to -170 (2002 & Supp. 2005); VA. CODE ANN. §§ 37.2-900 to -919 (2005 & Supp. 2006); WASH. REV. CODE ANN. §§ 71.09.010 to .902 (West 2002 & Supp. 2006); WIS. STAT. §§ 980.01 to .13 (West 1998 & Supp. 2005).

5. *See* TEX. HEALTH & SAFETY CODE ANN. § 841.081 (Vernon 2003 & Supp. 2006).

6. TEX. HEALTH & SAFETY CODE ANN. § 841.085 (Vernon 2003).

7. *See, e.g.*, Kansas v. Crane, 534 U.S. 407 (2002) (holding the Kansas SVP statute constitutional); Seling v. Young, 531 U.S. 250 (2001) (same for Washington); Kansas v. Hendricks, 521 U.S. 346 (1997) (same for Kansas).

continue to be held constitutional, it nevertheless is deeply flawed and should be changed or replaced for public policy reasons. Such reasons include (1) that the law fails to protect the public because it allows SVPs to roam loose and (2) that it dooms SVPs to return to prison, where they typically receive no treatment.[8] This Note will suggest some possible improvements to Texas's approach to handling the offenders it and other states have chosen to label "sexually violent predators," including the option that Texas replace its SVP statute with an inpatient civil commitment regime similar to those in other states.

Part II of this Note will reflect some historical background behind civil commitment, including the traditional rationales underlying it, the early emphasis on procedural due process in nineteenth century American jurisprudence, and the development of commitment laws specifically aimed at sex offenders in the twentieth century. Part III will address the state of the law on this issue in Texas, which provides for a unique statutory outpatient regime. Part IV will focus on the *Fisher* case, following it through every step of litigation, from Michael Fisher's commitment hearing, through the state appellate process, to the denial of certiorari by the United States Supreme Court. Along the way, it will highlight the ways in which *Fisher* exemplifies problems in the practical application of the Texas SVP statute. Finally, Part V will point out some changes the legislature has made to the SVP statute since its initial adoption in 1999 and will suggest additional needed changes.

II. HISTORICAL BACKGROUND

A. *Twin Justifications at Common Law*

In the United States, as in England, the common law originally controlled the civil commitment of the mentally ill.[9] The twin justifications traditionally relied upon for the detention of the insane have been (1) *parens patriae* and (2) the police power of the state.[10] The

8. *See* Transcript of Record vol. 3 at 94, *In re* Commitment of Fisher, 164 S.W.3d 637 (Tex. 2005) (No. 00-10-06622-CV) [hereinafter Transcript vol. 3] (copy on file with author) (noting that, with twenty-four to twenty-six thousand sex offenders in the Texas Department of Corrections, there were only four to five hundred treatment beds available).

9. *See* ALBERT DEUTSCH, THE MENTALLY ILL IN AMERICA: A HISTORY OF THEIR CARE AND TREATMENT FROM COLONIAL TIMES 419 (2d ed., rev. & enlarged, Columbia Univ. Press 1949).

10. BRUCE J. WINICK, CIVIL COMMITMENT: A THERAPEUTIC JURISPRUDENCE MODEL 3–4 (2005); JUDITH LYNN FAILER, WHO QUALIFIES FOR RIGHTS? HOMELESSNESS, MENTAL ILLNESS, AND CIVIL COMMITMENT 68 (2002); Sarah E. Spierling, Comment, *Lock Them Up and Throw Away the Key: How Washington's Violent Sexual Predator Law Will Shape the Future Balance Between Punishment and Prevention*, 9 J.L. & POL'Y 879, 887 (2001); *but see* CHRISTOPHER R. WILLIAMS & BRUCE A. ARRIGO, LAW, PSYCHOLOGY, AND JUSTICE: CHAOS THEORY AND THE NEW (DIS)ORDER 183–85 (Austin T. Turk ed., 2002) (suggesting that, beyond police power and *parens*

former rationale refers to the state's parental role in caring for those who cannot care for themselves.[11] The latter focuses on the state's duty to protect the public.[12] Over the centuries, there has been some tension between the two justifications, with one or the other gaining ascendancy during different periods.[13] Generally, however, courts invoke both justifications when deciding on civil commitment.[14] Hence the well-worn catch phrase that appears in commitment documents, "danger to self or others."[15]

Perhaps surprisingly, in one of the earliest cases in the United States dealing with civil commitment, the court placed great emphasis on due process (later an important focus in *Fisher* and other SVP litigation).[16] In late December 1839, in the town of Eaton, New Hampshire, a selectman named Jackson, receiving word that a local man named Colby had gone dangerously mad, locked Colby in a cage, wherein he remained for almost six weeks.[17] By all accounts, Colby was insane to the point that his friends and family feared for both his safety and their own.[18] All concurred that his forcible detention was urgently necessary.[19] Four of his sons helped to construct the cage in which Jackson then held him.[20]

In accordance with New Hampshire law, Jackson and the other selectmen of the town applied to the judge of probate, who issued a warrant authorizing them to assess Colby's state and return to the court with their opinion.[21] The selectmen dutifully interviewed the available witnesses and concluded that Colby was insane.[22] Without explanation, however, they failed to return to the probate court with their findings.[23] Colby's madness was apparently of a temporary na-

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patriae, an unspoken set of common cultural referents underlie civil commitments, informing and unifying otherwise contradictory medical and legal views).

11. WINICK, *supra* note 10, at 3–4; FAILER, *supra* note 10, at 68–69; Spierling, *supra* note 10, at 887.

12. WINICK, *supra* note 10, at 3–4; FAILER, *supra* note 10, at 70; Spierling, *supra* note 10, at 887.

13. FAILER, *supra* note 10, at 71–87.

14. *See, e.g.*, Foucha v. Louisiana, 504 U.S. 71, 80, 96 (1992) (noting both *parens patriae* and police power justifications for civil commitment); O'Connor v. Donaldson, 422 U.S. 563, 575–76 (1975) (same).

15. *See, e.g.*, *In re* Howard N., 106 P.3d 305, 316 (Cal. 2005); State v. White, 891 So. 2d 502, 504 (Fla. 2004); N.W. v. State, 678 S.W.2d 158, 161 (Tex. App.—Beaumont 1984, no writ).

16. *See* Colby v. Jackson, 12 N.H. 526 (Super. Ct. 1842).

17. *Id.* at 527. The background information appearing on pages 527 through 529 is most likely the work of the reporter, not the court.

18. *See id.* at 527–28.

19. *See id.* at 528.

20. *Id.*

21. *Id.* at 527.

22. *Id.* at 527–28.

23. *See id.* at 528, 532.

ture. He later sued Jackson for trespass, and the jury awarded him one dollar in damages.[24]

On appeal, the New Hampshire Superior Court, in an opinion authored by Justice Gilchrist, affirmed the trial court's judgment.[25] In doing so, the Court held that town selectmen do not, *ex officio*, have the power to incarcerate the insane without due process of law. Justice Gilchrist wrote that Jackson had the same right as anyone else to subdue and detain Colby initially due to the exigency of the circumstances.[26] He analogized to English authorities that held, for example, that one person may physically restrain another to prevent him from injuring himself or murdering his wife.[27] Jackson's "culpable omission of duty" was in failing to follow through with the procedures required by the laws of the state.[28]

The trial court had correctly rejected Jackson's request for a jury charge that, if they found that Colby was insane, and that it was dangerous for him to be at large, Jackson "had a right to confine him so long as he should continue thus insane and dangerous."[29] The Court held that "such an authority is possessed by no person, unless under the sanctions, and after compliance with the forms, of law."[30] Gilchrist made a "slippery slope" argument in support of the decision, fearing that, without such adherence to the forms of law, "[e]very cage would be a licensed private mad-house."[31]

Justice Gilchrist looked darkly back to the days of the Vagrant Act in the England of George II, when justices of the peace were authorized to "confine lunatics 'of the poorer sort . . . for confining, binding, and *beating* the unhappy man, in such manner as is proper and requisite . . . .'"[32] He wryly observed, "[t]he *quantum* of beating which is proper for 'the unhappy man,' being, of course, in the discretion of his keeper."[33] Gilchrist then reassured his readers that "the existence of such laws has passed away with the narrow views which produced them . . . ."[34] This assertion may have been premature, but many of the observations made by Justice Gilchrist in *Colby* remain relevant today.

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24. *See id.* at 526–29, 534.

25. *Id.* at 527. From 1776 to 1876, the Superior Court of Judicature was the highest state appellate court in New Hampshire. *See* Judicial Branch New Hampshire, Supreme Court, http://www.nh.gov/judiciary/supreme/about.htm (last visited Sept. 18, 2006).

26. *See id.* at 530–31.

27. *See id.*

28. *See id.* at 532.

29. *See id.* at 532–33.

30. *Id.* at 532.

31. *See id.*

32. *Id.* at 532–33.

33. *Id.* at 533.

34. *Id.*

B. *Sex Crimes and Statutes*

In the 1930s, alarmed by a perceived wave of sex crimes appearing in the media, people in the United States brought pressure to bear on state legislatures to pass laws addressing the alleged problem.[35] Michigan enacted the first of these "sex psychopath" statutes in 1937.[36]

1. Emphasis on Treatment: the *Parens Patriae* Approach

Although aimed at protecting the public, these laws focused largely on treatment of the offenders.[37] They provided for indefinite detention for treatment in lieu of imprisonment and were not considered punitive.[38] This reflects an emphasis placed on the treatment of the mentally ill during this period.[39] The committed individual would remain in a psychiatric facility until fully recovered or no longer dangerous.[40] Each state had its own set of procedures to determine which criminal defendants would be thus diverted from the criminal justice system to the mental health system, and how the committed person could obtain release upon recovery.[41]

The statutes did not go unchallenged.[42] They were attacked for denying due process and equal protection, for placing the accused in double jeopardy, for being ex post facto laws, for requiring self-incrimination, and for imposing cruel and unusual punishment.[43]

To expand on just one example, in 1940, Minnesota's "psychopathic personality" statute survived a challenge alleging that it violated the Fourteenth Amendment's due process and equal protection guarantees.[44] The statute defined "psychopathic personality" as:

> any person of such conditions of emotional instability, or impulsiveness of behavior, or lack of customary standards of good judgment, or failure to appreciate the consequences of his acts, or a combination of any such conditions, as to render such person irresponsible

35. Raquel Blacher, Comment, *Historical Perspective of the "Sex Psychopath" Statute: From the Revolutionary Era to the Present Federal Crime Bill*, 46 MERCER L. REV. 889, 889–900 (1995).

36. *Id.* at 897.

37. *See id.* at 901.

38. *See id.* at 912.

39. *See* FAILER, *supra* note 10, at 79.

40. *See* Blacher, *supra* note 35, at 897–98.

41. *See id.* at 899–900.

42. *Id.* at 902.

43. *See, e.g.*, Minnesota *ex rel.* Pearson v. Probate Court, 309 U.S. 270, 274 (1940) (holding that the statute did not violate equal protection or due process); People v. Chapman, 4 N.W.2d 18, 28 (Mich. 1942) (holding that the statute does not impose cruel and unusual punishment); *Ex parte* Keddy, 233 P.2d 159, 161 (Cal. Dist. Ct. App. 1951) (holding that the statute does not violate double jeopardy prohibition); State *ex rel.* Sweezer v. Green, 232 S.W.2d 897, 900 (Mo. 1950) (holding that the statute was not ex post facto criminal sanction); *see also* Blacher, *supra* note 35, at 902 (summarizing case law on these issues for this period).

44. Minnesota *ex rel.* Pearson v. Probate Court, 309 U.S. 270, 276–77 (1940).

> for his conduct with respect to sexual matters and thereby dangerous to other persons.[45]

Alleged psychopath Charles Pearson argued that the statute violated equal protection because it applied to individuals within a larger class: all those "guilty of sexual misconduct" or "having strong sexual propensities."[46] The Court rejected this argument, holding that the State had a "rational basis" for creating a separate class for habitual sex offenders.[47] Equally unavailing was Pearson's due process claim. The procedural safeguards outlined in the statute, such as a hearing before the probate court, the provision of counsel for the alleged psychopath, and the appointment of two licensed doctors to examine him, were sufficient to satisfy the Fourteenth Amendment.[48] Pearson's argument that he would be doomed to spend the rest of his life in an asylum likewise failed to persuade due to the statutory provisions allowing him, or anyone else, to petition the committing court for his release.[49]

2. Shift in Emphasis Toward Police Power

Despite surviving constitutional challenges, many states had repealed their sex offender commitment laws by the 1980s.[50] This was due in part to a growing perception that sex offenders are not mentally ill and that they do not respond to treatment.[51] During this same period, there was also a "rising concern for civil rights"[52] reflected as a renewed concern for procedural due process.[53] Court decisions increasingly invoked the "language of rights."[54]

Accompanying this trend was a move away from the emphasis on treatment and the *parens patriae* rationale prevalent in the 1930s and 1940s.[55] Instead, the police power of the state and the need to protect the public became the dominant rationale underlying civil commitment.[56] By the 1970s, most civil commitments rested primarily on police power.[57]

The most influential case involving civil commitment during the 1970s, and one that reflected this shift in emphasis, was *O'Connor v.*

45. *Id.* at 272.
46. *See id.* at 273.
47. *See id.* at 274.
48. *See id.* at 275–76.
49. *See id.* at 276.
50. Blacher, *supra* note 35, at 906.
51. *Id.*
52. *Id.*
53. *See* FAILER, *supra* note 10, at 83–85.
54. *Id.* at 85.
55. *See id.* at 80–87.
56. *See id.* at 87.
57. *Id.*

Donaldson.[58] In that case, Kenneth Donaldson was involuntarily confined for fifteen years for "care, maintenance, and treatment."[59] In fact, there was little if any treatment involved other than "milieu therapy"—a "euphemism for confinement in the 'milieu' of a mental hospital."[60] Donaldson eventually sued the superintendent of the hospital, contending that he posed no danger to anyone and could live safely out of confinement.[61] The trial court agreed.[62] Donaldson gained his freedom and went promptly to work in hotel administration.[63] The court awarded both actual and punitive damages.[64]

On appeal, the Fifth Circuit emphasized Donaldson's right to treatment. It addressed the question "whether the Fourteenth Amendment guarantees a right to treatment to persons involuntarily civilly committed to state mental hospitals."[65] It held that when, as in Donaldson's case, the rationale underlying the confinement was the patient's need for treatment, that minimally adequate treatment must be provided.[66] In doing so, the court implied that the Constitution permitted the state to confine an individual in need of treatment regardless of whether the person was a danger to self or others.[67]

The Supreme Court disagreed, opining that there was no need to address the question whether a person who was both mentally ill and dangerous had a right to treatment.[68] Rather, the important consideration for purposes of involuntary commitment was dangerousness. The Court held that there was "no constitutional basis for confining such [mentally ill] persons involuntarily if they are dangerous to no one and can live safely in freedom."[69] Following *Donaldson*, civil commitment statutes survive judicial scrutiny if they satisfy three criteria: (1) the committed person suffers mental illness; (2) is a danger to self or others; and (3) there is no less restrictive alternative.[70]

58. O'Connor v. Donaldson, 422 U.S. 563 (1975).
59. *Id.* at 565–66.
60. *Id.* at 569.
61. *See id.* at 568.
62. *See id.*
63. *Id.*
64. *See id.* at 572.
65. Donaldson v. O'Connor, 493 F.2d 507, 509 (5th Cir. 1974).
66. *O'Connor*, 422 U.S. at 572.
67. *See id.* at 572.
68. *Id.* at 573.
69. *Id.* at 575.
70. *See, e.g.*, Foucha v. Louisiana, 504 U.S. 71, 86 (1992) (averring that a state must establish both insanity and dangerousness to justify civil commitment); *O'Connor*, 422 U.S. at 575–76 (holding that a state cannot confine a non-dangerous mentally ill individual who is capable of living safely in freedom); *see also* Spierling, *supra* note 10, at 889.

C. *SVP Statutes*

Beginning in the early 1990s, states began passing civil commitment laws that "blur the line between civil laws, which are treatment-oriented, and criminal laws, which are designed to punish specific behavior."[71] The first state to pass a statute of the current "sexually violent predator" variety was Washington.[72] This legislation resulted from a particularly horrific sex crime that generated a great deal of media attention.[73] Earl K. Shriner had been released from prison for only a short time when he kidnapped, raped, strangled, and sexually mutilated a seven-year-old boy in 1988.[74] In response to the public outcry following this crime, Washington passed the Community Protection Act in 1990.[75] The Act included provisions authorizing the indefinite civil commitment of people found to be "sexually violent predators."[76]

The previously existing civil commitment statute was found inadequate to deal with repeat sex offenders because it required that the person committed be mentally ill as well as dangerous.[77] Many sex offenders, like Earl Shriner, failed to meet the mental illness requirement.[78] To fill this gap, the Washington legislature crafted a statute specifically addressing the problem such dangerous individuals posed once they could no longer be kept in prison.[79]

In its legislative findings, Washington noted that "a small but extremely dangerous group of sexually violent predators exist who do not have a mental disease or defect that renders them appropriate for the existing involuntary treatment act . . . ."[80] The new "sexually violent predator" statute applied to people convicted of a sexually violent offense who are about to be released from prison; those charged with a sexually violent offense found incompetent to stand trial; those found not guilty by reason of insanity of a sexually violent crime; and those convicted of a sexually violent crime who have been previously released, but who have committed a "recent overt act" and "it appears that the person may be a sexually violent predator."[81]

The statute defines "sexually violent predator" as "any person who has been convicted of or charged with a crime of sexual violence and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in predatory acts of sexual violence

71. Spierling, *supra* note 10, at 890.
72. *Id.* at 892.
73. *Id.*; *see also* Blacher, *supra* note 35, at 908–09.
74. Spierling, *supra* note 10, at 892; *see also* Blacher, *supra* note 35, at 908.
75. Spierling, *supra* note 10, at 892–93.
76. *Id.* at 893.
77. *See* Blacher, *supra* note 35, at 907.
78. *Id.* at 909.
79. *See id.* at 907–11.
80. WASH. REV. CODE ANN. § 71.09.010 (West 2002).
81. *Id.* § 71.09.030.

if not confined in a secure facility."[82] The alleged "sexually violent predator" has the right to counsel during the commitment hearing and the right to demand a jury trial. If, after a hearing, the person is found beyond a reasonable doubt to be a "sexually violent predator," he is committed indefinitely to the State Department of Social and Health Services "until such time as: (a) [his] condition has so changed that [he] no longer meets the definition of a sexually violent predator; or (b) conditional release to a less restrictive alternative . . . is in the best interest of the person and conditions can be imposed that would adequately protect the community."[83]

Following Washington's lead, numerous states began to pass statutes providing for the indefinite, involuntary civil commitment of individuals found to be "sexually violent predators."[84] These statutes tend to employ similar language in their findings and definitions. For example, the Kansas SVP statute defines "sexually violent predator" in much the same way as Washington: "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 [sic] predatory acts of sexual violence."[85]

The Kansas SVP statute came under immediate constitutional attack. Leroy Hendricks, an inmate with a long history of molesting children, was the first person committed under the Kansas statute. Hendricks was about to be released from prison when the statute went into effect.[86] He challenged the statute's validity in state court on due process, double jeopardy, and ex post facto grounds.[87] The trial court declined to rule on the constitutional issues, but found probable cause that Hendricks was a sexually violent predator and ordered him to be held for evaluation at a state hospital pending a jury trial.[88] Faced with evidence of Hendricks's long history of child sexual abuse, the jury found that he was a sexually violent predator.[89] The trial court also determined, as a matter of law, that pedophilia was a "mental abnormality" as defined in the statute.[90]

On appeal, Hendricks continued to pursue his due process, double jeopardy, and ex post facto claims.[91] The Kansas Supreme Court reversed the judgment of the trial court and invalidated the statute on due process grounds alone. It held that, in order to involuntarily com-

82. *Id.* § 71.09.020.
83. *Id.* § 71.09.060.
84. Spierling, *supra* note 10, at 894–95.
85. KAN. STAT. ANN. § 59-29a02(a) (1994).
86. Kansas v. Hendricks, 521 U.S. 346, 350 (1997).
87. *Id.*
88. *Id.* at 354.
89. *Id.* at 355.
90. *Id.* at 355–56.
91. *Id.* at 356.

mit someone in a civil proceeding, the individual must be both mentally ill and dangerous. Additionally, the Court held that the statute's definition of "mental abnormality" did not satisfy the "mental illness" requirement.[92] The United States Supreme Court, in turn, granted certiorari and reversed. In an opinion authored by Justice Thomas, the Court held that the term "mental illness" does not have "talismanic significance," and that states are not required "to adopt any particular nomenclature in drafting civil commitment statutes."[93] The Court noted that "'psychiatrists disagree widely and frequently on what constitutes mental illness,'"[94] and that courts and legislatures have adopted different terminologies to refer to "volitional impairment[s]" that make people "dangerous beyond their control."[95] These semantic variations do not, by themselves, violate due process.[96]

Perhaps more interestingly, the Court chose to address the double jeopardy and ex post facto claims that Hendricks had raised on cross-petition, but that were never reached by the lower courts.[97] Hendricks argued that the Kansas statute established criminal proceedings and that his confinement under it was punishment for past criminal wrongdoing. Because the statute was passed after the crimes were committed and because he had already served his prison sentence, the statute violated the Constitution's ex post facto and double jeopardy prohibitions.[98] In order to address these claims, the Court had to determine whether the statute was civil or criminal in nature.

The analysis of this issue began with the presumption that it "'is first of all a question of statutory construction.'"[99] The Court acknowledged that the legislature simply labeling a statute "civil" is not necessarily dispositive of the question.[100] The label, however, combined with other considerations, such as Kansas's choice to include the statute in the probate code rather than the criminal code, led the Court to give initial deference to the legislature's express intent: "Nothing on the face of the statute suggests that the legislature sought to create anything other than a civil commitment scheme designed to protect the public from harm."[101] To overcome this deferential presumption that the statute is civil would require "'the clearest proof'" that it is "'so punitive in purpose or effect as to negate [the State's] intention' to deem it 'civil.'"[102]

92. *Id.*
93. *Id.* at 359.
94. *Id.* (quoting Ake v. Oklahoma, 470 U.S. 68, 81 (1985)).
95. *Id.* at 358.
96. *See id.* at 360.
97. *See id.* at 360–61.
98. *Id.* at 361; *see also* U.S. CONST. art. I, § 9, cl. 3; U.S. CONST. amend. V.
99. *Hendricks*, 521 U.S. at 361 (quoting Allen v. Illinois, 478 U.S. 364, 368 (1986)).
100. *Id.* at 361 (quoting *Allen*, 478 U.S. at 369).
101. *Id.*
102. *Id.* (quoting United States v. Ward, 448 U.S. 242, 248–49 (1980)).

The Court concluded that the statutory scheme was not punitive because it failed to meet the two purposes of criminal punishment: retribution and deterrence.[103] The statute was not retributive because it looked to prior criminal conduct, not to assign blame, but merely to predict future dangerousness.[104] The fact that the statute was "'tied to criminal activity'" did not automatically make it punitive.[105] Moreover, the Court held the statute could serve no deterrent purpose because persons committed under it were, by definition, unable to control their behavior.[106] Because the Court held that the Kansas SVP statute was civil rather than criminal, both the ex post facto and double jeopardy claims—applicable exclusively to criminal proceedings—failed.[107] *Hendricks* remains the most influential case upholding the constitutionality of state SVP "civil" commitment statutes.[108]

III. THE LAW IN TEXAS

In some ways, the Texas SVP statute resembles those in other states. For example, the language in the legislative findings is virtually identical to statutes in states like Washington and Kansas: "A small but extremely dangerous group of sexually violent predators exists . . . ."[109] The Texas statute, however, is hardly a "copycat" law. It is unique in several respects. For example, Texas defines SVPs as having "a behavioral abnormality" rather than a "mental disease or defect."[110] More significantly, Texas is the only state to provide for outpatient commitment rather than inpatient treatment in secure facilities.[111] Closely connected to this, and again unique among the states, the Texas statute provides for criminal penalties for the violation of any requirements of outpatient commitment.[112] Any such vio-

103. *See id.* at 361–62.
104. *Id.* at 362.
105. *Id.* (quoting United States v. Ursery, 518 U.S. 267 (1996)).
106. *Id.*
107. *See id.* at 369–71.
108. Kansas v. Hendricks, 521 U.S. 346 (1997); *see also* State's Petition for Review at 6–9, *In re* Commitment of Fisher, 164 S.W.3d 637 (Tex. 2005) (No. 04-0112) [hereinafter State's Petition] (referring repeatedly to *Hendricks* as the preeminent authority on this issue).
109. TEX. HEALTH & SAFETY CODE ANN. § 841.001 (Vernon 2003); *see* IOWA CODE ANN. § 229A.1 (West 2006); KAN. STAT. PROB. ANN. § 59-29a01 (West Supp. 2006); WASH. REV. CODE ANN. § 71.09.010 (West 2002).
110. TEX. HEALTH & SAFETY CODE ANN. § 841.001 (Vernon 2003); *cf., e.g.*, IOWA CODE ANN. § 229A.1 (West Supp. 2005) (employing "mental disease of defect"); KAN. STAT. ANN. § 59-29a01 (1994) (same).
111. *See* TEX. HEALTH & SAFETY CODE ANN. § 841.081 (Vernon Supp. 2006); Allison Taylor, *Civil Commitments of Sexually Violent Predators*, THE TEXAS PROSECUTOR, Sept.–Oct. 2003, at 36 (discussing unique aspects of Texas SVP statute); Rahn K. Bailey, *Sexually Violent Predators: Texas' Moderate Approach to Civil Commitment*, AM. ACAD. PSYCHIATRY & L. NEWSL., Sept. 2001, http://www.emory.edu/AAPL/newsletter/N263_Sexually%20violent%20predators.htm (same).
112. *See* TEX. HEALTH & SAFETY CODE ANN. § 841.085 (Vernon 2003).

lation is a third-degree felony.[113] Because almost all SVPs under the statute have prior felony convictions, an additional third-degree felony can send them back to prison for life.[114] The requirements imposed on the committed individual are:

> (1) requiring the person to reside in a Texas residential facility under contract with the council or at another location or facility approved by the council;
> (2) prohibiting the person's contact with a victim or potential victim of the person;
> (3) prohibiting the person's possession or use of alcohol, inhalants, or a controlled substance;
> (4) requiring the person's participation in and compliance with a specific course of treatment;
> (5) requiring the person to:
> (A) submit to tracking under a particular type of tracking service and to any other appropriate supervision; and
> (B) refrain from tampering with, altering, modifying, obstructing, or manipulating the tracking equipment;
> (6) prohibiting the person from changing the person's residence without prior authorization from the judge and from leaving the state without that prior authorization;
> (7) if determined appropriate by the judge, establishing a child safety zone in the same manner as [required under the] Code of Criminal Procedure, and requiring the person to comply with requirements related to the safety zone;
> (8) requiring the person to notify the case manager immediately but in any event within 24 hours of any change in the person's status that affects proper treatment and supervision, including a change in the person's physical health or job status and including any incarceration of the person; and
> (9) any other requirements determined necessary by the judge.[115]

Although subsection (9) above appears to allow the judge some discretion in imposing additional requirements, in practice, all committed SVPs are required to adhere to the same 97 additional contractual obligations.[116] This may be due, in part, to the fact that the statute requires all SVP commitment hearings to be held in the same county.[117] Attorneys for the State Counsel for Offenders are appointed to represent alleged SVPs at these hearings.[118] These attorneys report that SVP commitment hearings are almost invariably

113. *Id.*
114. *See* Commitment of Fisher v. State, 123 S.W.3d 828, 840 (Tex. App.—Corpus Christi 2003) (en banc), *rev'd sub nom. In re* Commitment of Fisher, 164 S.W.3d 637 (Tex. 2005), *cert. denied*, 126 S. Ct. 428 (2005).
115. TEX. HEALTH & SAFETY CODE ANN. § 841.082 (Vernon Supp. 2006).
116. *See Commitment of Fisher*, 123 S.W.3d at 851–58 (reproducing the Civil Commitment Requirements: Treatment and Supervision Contract).
117. *See* TEX. HEALTH & SAFETY CODE ANN. § 841.041 (Vernon 2003 & Supp. 2006) (permitting the state attorney to file a petition in Montgomery County).
118. TEX. HEALTH & SAFETY CODE ANN. § 841.005 (Vernon 2003).

heard by the same judge, Putnam K. Reiter, and this also contributes to the consistency with which the same contractual requirements are imposed.[119] The committed SVP must agree to these additional provisions and faces a third-degree felony charge for breaching any of them.[120] Some of the more extreme examples of these provisions include:

> 5. I will not have direct or indirect contact with children unless supervised . . . .
> 6. If I am in an area where children are, I will leave the area. . . .
>
> . . .
>
> 9. I will not have any contact with family members unless approved by the Case Manager and Treatment Staff. . . .
> 10. I understand that family members may be required to submit to a criminal background check before I can have contact with them.
>
> . . .
>
> 15. I will not watch R-rated movies or TV programs unless I discuss it with the Case Manager and Treatment Staff and receive prior written approval . . . .
>
> . . .
>
> 17. I will not cruise for victims. That is, I will not walk or ride around aimlessly, nor will I sit and watch people.
> 18. I will not go to schools, parks, swimming pools, movie theaters, public libraries, amusement parks, arcades or malls . . . .
> 19. I will not use prostitutes. I will not travel through or go to places where prostitutes are located.
>
> . . .
>
> 26. I will not use fetishism [sic].
> 27. I will not masturbate to deviant fantasies, especially to fantasies of victims or potential victims. I will stop deviant fantasies when they occur.
>
> . . .
>
> 35. I will not engage in casual sex, that is, sex with persons with whom I am not in a committed, monogamous relationship.
>
> . . .
>
> 37. I will not have sexual contact with a person without first telling him or her that I am a Sexually Violent Predator. Before I have sexual contact with that person, I will sign a release permitting unfettered, two-way communication between the Case Manager and Treatment Staff and my potential sexual partner. I understand that the Case Manager and Treatment Staff must meet with my potential sexual partner before I have sex with that person.
>
> . . .

119. Interview with State Counsel for Offenders, in Huntsville, Tex. (Oct. 28, 2005) [hereinafter Counsel Interview] (notes on file with author). In order to shield individual attorneys from potential political fallout, the Author has chosen to collectively cite attorneys currently serving with the State Counsel for Offenders.

120. TEX. HEALTH & SAFETY CODE ANN. § 841.085 (Vernon 2003).

> 46. I will not buy, borrow, steal, possess or use cameras, video recorders, audio recorders, CD recorders, DVD recorders or any other recording device.
>
> . . .
>
> 48. I will not use a Post Office box.
>
> . . .
>
> 55. If and when I am allowed to operate a motor vehicle, I will never pick up hitchhikers or stop to help persons stranded on the road.
>
> . . .
>
> 82. I understand that I must have a written assignment ready to present to every group therapy session. I understand that partially completed work is not acceptable. I understand that I must be working on revisions of worksheets or new versions of worksheets at all times. I understand that I must be prepared to present at least twenty minutes of worksheet material from my Client Handbook at every group therapy session. When not presenting my own assignments, I agree to actively listen and actively give feedback to group members who do present topics.[121]

It seems implausible that a person with "a behavioral abnormality that is not amenable to traditional mental illness treatment"[122] would be able to live up to such stringent requirements.[123]

By all accounts, the primary reason for implementing an outpatient, rather than an inpatient, commitment statute was to save the state money.[124] In this respect, the Texas SVP statute may be considered a success (especially if one ignores the expense of subsequent incarceration).[125] For example, in 2004, Texas spent on average only $31,000 per committed SVP, as compared to $66,456 in Iowa, $59,939 in New Jersey, and a whopping $105,665 in Washington, to name only a few.[126]

Perhaps inevitably, the unique provisions of the Texas SVP law raise unique questions. For example, does attaching criminal penalties to the violation of a civil commitment regime create a "statutory

121. *Commitment of Fisher*, 123 S.W.3d at 853–55, 857 (reproducing the Civil Commitment Requirements: Treatment and Supervision Contract).

122. TEX. HEALTH & SAFETY CODE ANN. § 841.001 (Vernon 2003).

123. *See* Council on Sex Offender Treatment, Texas Sexually Violent Predator Act, http://www.dshs.state.tx.us/csot/csot_txsvp.doc (last visited Sept. 18, 2006) (giving a concise and readable summary of the general provisions of the Texas SVP Act).

124. *See* Taylor, *supra* note 111, at 39; Council on Sex Offender Treatment, Civil Commitment of the Sexually Violent Predator – History of Civil SVP Act, http://www.dshs.state.tx.us/csot/csot_cctxhist.shtm (last visited Sept. 18, 2006) (stating unequivocally that "[t]he Outpatient Program was chosen strictly due to fiscal constraints").

125. *See* Council on Sex Offender Treatment, State by State SVP Act Comparison, http://www.dshs.state.tx.us/csot/csot_compar.shtm (last visited Sept. 18, 2006) (reflecting savings under Texas SVP commitments as compared with inpatient commitments in other states).

126. *Id.*

scheme"[127] that is *more* punitive than the one held constitutional in *Kansas v. Hendricks*? Or, on the contrary, is outpatient commitment a laudable "less restrictive alternative" to inpatient treatment?[128] Similarly, because of the criminal penalties attached to violating the outpatient commitment requirements, should the alleged SVP be accorded criminal due process rights during the commitment hearing?[129]

The SVP statute also raises broader public policy questions. Does it adequately address the twin justifications of civil commitment: (1) treatment of the individual and (2) protection of the public? With respect to the latter, does it not in fact place the general public at greater risk with "sexually violent predators" running loose, constrained only by the provisions of their commitment "contracts"?[130] Does such "contractual" restraint make sense when applied to individuals who, by definition, are unable to control their sexually violent behaviors?[131] Does saving money alone justify placing the general public at risk in this way? These are some of the questions raised when one examines the recent case, *In re Commitment of Fisher*,[132] to which this Note now, finally, turns.

IV. THE COMMITMENT OF MICHAEL FISHER

Michael Fisher is a mentally retarded, paranoid schizophrenic.[133] He has two children from a common-law marriage that lasted some five years.[134] In the late 1980s, he pleaded guilty to two sexual assaults.[135] Both Fisher's sexual assault victims were adult women. There is some evidence that both were prostitutes, and the assault charges may have arisen as a result of a misunderstanding regarding payment.[136] Considering Fisher's mental condition, this does not

127. Kansas v. Hendricks, 521 U.S. 346, 361 (1997).

128. *See* Bailey, *supra* note 111, at 22; State's Petition, *supra* note 108, at 7 (describing the Texas SVP statute as "similar to, though less restrictive than" Kansas's SVP statute).

129. *See* Commitment of Fisher v. State, 123 S.W.3d 828, 834–38 (Tex. App.—Corpus Christi 2003) (en banc), *rev'd sub nom. In re* Commitment of Fisher, 164 S.W.3d 637 (Tex. 2005), *cert. denied*, 126 S. Ct. 428 (2005).

130. *See* Robert Tharp & Diane Jennings, *An Easy Out for Sexual Predators?*, DALLAS MORNING NEWS, July 9, 2006, at 1A (criticizing the outpatient SVP program on this basis).

131. *See* TEX. HEALTH & SAFETY CODE ANN. § 841.002 (Vernon 2003) (defining "behavioral abnormality" as a "condition that, by affecting a person's emotional or volitional capacity, predisposes the person to commit a sexually violent offense").

132. *In re* Commitment of Fisher, 164 S.W.3d 637 (Tex. 2005), *cert. denied*, 126 S. Ct. 428 (2005).

133. *Commitment of Fisher*, 123 S.W.3d at 832.

134. Transcript of Record vol. 5 at 22, *In re* Commitment of Fisher, 164 S.W.3d 637 (Tex. 2005) (No. 00-10-06622-CV) [hereinafter Transcript vol. 5] (copy on file with author).

135. *Commitment of Fisher*, 123 S.W.3d at 833.

136. *See id.* at 833; Transcript of Record vol. 2 at 119, 121, *In re* Commitment of Fisher, 164 S.W.3d 637 (Tex. 2005) (No. 00-10-06622-CV) [hereinafter Transcript vol.

seem implausible. Fisher contends that he was not guilty, but that other factors motivated his plea.[137] He has had other brushes with the law, but none of these were sexually related.[138] For example, while on probation he assaulted his wife and attempted to remove his satellite monitoring device.[139] As Fisher's most recent term of imprisonment neared its end, the State filed a petition in Montgomery County, pursuant to § 841.041 of the SVP statute, alleging him to be a "sexually violent predator."[140] The following proceedings ensued as a result.

A. *The Hearing*

The Fisher commitment hearing began May 29, 2001, in Montgomery County.[141] Christopher Thetford of the Special Prosecution Unit (SPU) represented the State of Texas.[142] Two attorneys with the State Counsel for Offenders, Dixie Pritchard and Etta Warman, represented Fisher[143] in accordance with § 841.005(a) of the SVP statute.[144] At the outset, Ms. Pritchard filed motions for a continuance and a competency hearing. Judge Reiter noted that, as of that time, the recently-enacted SVP statute had not undergone appellate review, but he doubted that Texas law provided for a competency hearing under it.[145] The question was postponed until after *voir dire*. Prior to this, the court addressed the panel regarding the style of the case, "the State of Texas versus Michael Fisher" and added "[t]hat sounds like a criminal case, but it's not. This is a civil case that will be tried before a jury."[146]

1. Motion for Continuance

After empanelling the jury and dismissing them for the day, the court returned to Fisher's motions for continuance and for a competency hearing.[147] In support of the former, Ms. Pritchard called Michael Fisher himself to the stand.[148] In spite of much incoherent

2] (copy on file with author); Transcript vol. 3, *supra* note 8, at 187–88 (testimony of Michael Fisher).

137. *Commitment of Fisher*, 123 S.W.3d at 833; *see* Transcript vol. 2, *supra* note 136, at 177–220.

138. *Commitment of Fisher*, 123 S.W.3d at 833.

139. *Id.*

140. *Id.* at 832; *see also* TEX. HEALTH & SAFETY CODE ANN. § 841.041 (Vernon 2003 & Supp. 2006) (permitting State's attorney to file a petition alleging that person is a sexually violent predator).

141. *See* Transcript of Record vol. 1 at 1, *In re* Commitment of Fisher, 164 S.W.3d 637 (Tex. 2005) (No. 00-10-06622-CV) (copy on file with author).

142. *Id.* at 2.

143. *Id.*

144. TEX. HEALTH & SAFETY CODE ANN. § 841.005(a) (Vernon Supp. 2006) (stating that "the Office of State Counsel for Offenders shall represent an indigent person subject to a civil commitment proceeding under this chapter").

145. *See* Transcript vol. 2, *supra* note 136, at 7.

146. *Id.* at 16.

147. *See id.* at 112–13.

148. *See id.* at 114–15.

rambling, the testimony elicited from Fisher made it clear that, up until a very short time before, he had been too mistrustful of Ms. Pritchard to cooperate in preparation for the hearing.[149] The following excerpt typifies the general tenor of Fisher's testimony:

> A: [I] went home to my mama, ma'am. When I got home from my mama, I gave my mama the car keys. I laid in bed and went to sleep. I was tranquilizer, ma'am, and I had a little bit of drink with her that night when I bought that beer, ma'am, at her apartment, and we left the store. I did not have my penis. They didn't find, had no kind of substance in her. I read my—what they call that serve-all papers that Ms. Higgins gave me. Now, Ms. Higgins, I don't know her whole name, she's a parole counselor. She say on there, you do not have no emphysema, no kind of sperm, no kind of—you did not penetrate her vagina. You did not have your sexual organ in her. I was not guilty. It had on there "serve all."
>
> Q [from Ms. Pritchard]: Mr. Fisher, now that you believe that for some part that I'm on your side, would you allow me to speak to your mother about your case so that I can prepare for your case?
>
> A: I don't know for you to speak to my mother ma'am. My mother, she don't read well. She don't understand well. She don't comprehend that well. She's kind of an elderly person, yes, ma'am.[150]

Although Ms. Pritchard explained to Fisher several times what a continuance was and why he needed one, he responded, "That's all right, ma'am, no thank you."[151] Accordingly, the court denied the motion.[152]

2. Motion for a Competency Hearing

With respect to the motion for a competency hearing, the court noted that, not only does § 841 not explicitly provide for a competency determination, but respondents in such proceedings would in many cases likely not be competent to stand trial in a criminal case.[153] Additionally, the court did not "see that as being required in this proceeding."[154] Nevertheless, the court allowed Ms. Pritchard to make a "bill of exceptions" by putting on any evidence she had regarding competence.[155] The judge conceded, "if I err I'm confident a reviewing court will so tell me."[156]

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149. *See id.* at 115–29.
150. *Id.* at 120.
151. *Id.* at 128.
152. *Id.* at 137.
153. *Id.*
154. *Id.* at 138.
155. *See id.* at 139.
156. *Id.* at 138.

a. *Testimony of Dr. Floyd Jennings*

With the jury still out of the courtroom, Ms. Pritchard called Dr. Floyd Jennings, a psychologist and attorney.[157] After establishing Dr. Jennings's *bona fides*, Ms. Pritchard questioned him about his examination of Fisher.[158] Dr. Jennings testified that, if the court were to order Fisher to participate in an outpatient treatment program, Fisher would be unable to do so due to his mental condition.[159] He further opined that Fisher lacked the requisite understanding to assist counsel in his defense.[160] As a lawyer, Dr. Jennings expressed the view that "in any circumstance wherein a significant deprivation of liberty is involved . . . the issue of capacity to participate is a significant variable."[161] This raised due process concerns, as did the idea of "ordering participation in a program in which the defendant was unable to participate and from which he could scarcely benefit."[162] Jennings went on to say that such an order would be tantamount to a "'sham' . . . wherein the defendant or the patient would be anticipated to fail because he could not understand what is asked of him."[163] Treatment programs for sex offenders are verbally intensive, he added, and require a "modicum of intellect" for one to be able to participate successfully.[164]

On cross-examination, Mr. Thetford chastised Jennings for "educating the judge about the law" and asked him if he thought Fisher was "dangerous."[165] Jennings replied that, if Thetford meant "dangerous" in terms of the old civil commitment statute,[166] then Fisher was primarily a danger to himself, and only secondarily to others.[167] In response to Mr. Thetford's query whether Jennings could suggest a better alternative to the proposed outpatient commitment, Jennings made a rather elaborate proposal.[168] The upshot of the proposal aimed at providing Fisher with protective custody and emergency detention under the old civil commitment statute so that he could receive appropriate care at Vernon State Hospital, a secure psychiatric facility.[169]

157. *Id.* at 139–40.
158. *See id.* at 144–45.
159. *Id.* at 145.
160. *See id.* at 145–46.
161. *Id.* at 146.
162. *Id.* at 148–49.
163. *Id.* at 149.
164. *Id.*
165. *Id.* at 149–50.
166. *See* TEX. HEALTH & SAFETY CODE ANN. §§ 574.034 to .035 (Vernon 2003) (requiring that a person ordered to undergo mental health services be a danger to self or others due to mental illness).
167. Transcript vol. 2, *supra* note 136, at 150.
168. *See id.* at 151–53.
169. *See id.*; Commitment of Fisher v. State, 123 S.W.3d 828, 833 (Tex. App.—Corpus Christi 2003) (en banc), *rev'd sub nom. In re* Commitment of Fisher, 164 S.W.3d 637 (Tex. 2005), *cert. denied*, 126 S. Ct. 428 (2005).

Mr. Thetford agreed that this would not be a bad idea, but said "[Y]ou understand that judicially . . . I have no ability to do what you're suggesting?"[170]

b. *Testimony of Dr. Fred Fason*

Ms. Pritchard next called Dr. Fred Lanier Fason, a psychiatrist.[171] Dr. Fason testified as to Fisher's intellectual abilities, describing him as "mildly retarded" with an I.Q. in the lower 60's.[172] He also stated that Fisher had no factual or rational understanding of the proceedings and that there was no way he could stand trial competently.[173] He said that Fisher's "view of himself and of his situation is so unrealistic that it's psychotic."[174] Fason agreed with Dr. Jennings that it would be impossible for Fisher to conform to the terms of an outpatient commitment program.[175] Mr. Thetford did not cross-examine Dr. Fason.[176]

c. *Closing Arguments*

In closing argument on the threshold issue of a competency hearing, Ms. Pritchard argued that although § 841 is silent on the issue of competency, various factors pointed toward the propriety of granting one.[177] For example, the statute provided that the defendant had the right to appear at the trial, to communicate with his lawyer, and to help cross-examine witnesses.[178] It also provided for a court-appointed attorney, which civil trials normally do not.[179] Calling the proceedings "quasi-criminal," Pritchard went on to point out that § 841 borrowed heavily from the Code of Criminal Procedure, including the burden of proof "beyond a reasonable doubt."[180] Taken together, these factors indicated that Fisher was entitled to a criminal competency hearing.[181]

In response, Mr. Thetford spoke on behalf of the State, saying that he was "aware of the difficult position" that everyone was in, but "the only authority that the Legislature or the Governor gave me under this statute was to proceed to have Mr. Fisher committed as a sexually violent predator."[182] He reiterated that there is no provision in the

170. Transcript vol. 2, *supra* note 136, at 157.
171. *Id.* at 159–60.
172. *See id.* at 167; *see also Commitment of Fisher*, 123 S.W.3d at 832.
173. Transcript vol. 2, *supra* note 136, at 165–66; *see also Commitment of Fisher*, 123 S.W.3d at 832.
174. Transcript vol. 2, *supra* note 136, at 169.
175. *Id.*
176. *See id.* at 170; *Commitment of Fisher*, 123 S.W.3d at 832.
177. *See* Transcript vol. 2, *supra* note 136, at 171.
178. *See id.* at 171–72.
179. *See id.* at 172–73.
180. *See id.* at 173.
181. *See id.* at 174.
182. *Id.* at 175–76.

statute requiring competence.[183] "If there is a solution, I will be glad to hear it, but as it stands now Chapter 841 is the only solution that exists for Mr. Fisher."[184]

In ruling on the motion for a competency hearing, the court pointed out that it had previously held § 841 constitutional in response to a request from the State Counsel for Offenders for a declaratory judgment on the matter.[185] Until overturned, that decision would stand: "a reviewing court may say the statute is unconstitutional and the Texas Legislature had no knowledge of what it was doing when it adopted this statute, and that, further, the Governor had no idea what he was doing when he signed it into law."[186] The court went on to explain that the fact that the statute adopted some procedures like those of a criminal trial did not prevent the proceedings from being civil and that the legislature must have been aware that many respondents under this statute would suffer from mental illness.[187] If the legislature had wished to provide for a determination of competence, it could easily have done so.[188] The motion was denied; the exception was noted.[189]

3. The Jury Trial

At the subsequent hearing, before the jury was brought in, Ms. Pritchard asked the court on behalf of Mr. Fisher for an abeyance in order to reconsider the alternative solution suggested by Dr. Jennings: that Fisher be committed to a secure facility under the old civil commitment statute.[190] The court responded that such a solution "flies directly in the face of Chapter 841 . . . which provides a time frame for civil commitment in the SVP cases."[191] The court's concern was that under the older statute, the release of the individual was determined by "mental health experts" and could leave the public "completely at risk."[192] The two alternative solutions, he added, were "like apples and catfish, they don't mix all that well."[193] The court denied the motion to abate, once more noting Fisher's exception to the ruling.[194]

Both sides brought experts to testify for the jury. On behalf of Michael Fisher, Ms. Pritchard tried to impeach one of the State's witnesses, a psychologist named Doug Bertling, by pointing to the results

183. *See id.* at 176.
184. *Id.* at 176–77.
185. *Id.* at 178.
186. *Id.* at 179.
187. *See id.* at 179–80.
188. *See id.* at 180.
189. *See id.* at 181.
190. *See* Transcript vol. 3, *supra* note 8, at 5.
191. *Id.* at 6.
192. *Id.*
193. *Id.* at 7.
194. *Id.*

of one of the diagnostic tests relied on by the State—a form that Mr. Bertling had filled out.[195] The test, called a Static-99, is used to predict the likelihood of future sexual offenses.[196] One of the questions asked whether the individual has ever been married.[197] Bertling had put "no" on Fisher's form in answer to that question, although Fisher claimed to have been common-law married for five years.[198] The answer made a significant difference regarding how likely Fisher was to re-offend, according to the test. Mr. Bertling had no explanation for the error, and admitted that he may never have met with Fisher at all, relying instead on notes taken by a subordinate.[199]

Ms. Pritchard repeatedly attacked the validity and reliability of the tests relied upon by the State in assessing sex offenders, including the Static-99 and another diagnostic tool called the MnSOST-R. She introduced video depositions by experts Dr. Woodworth and Dr. Hart casting serious doubt on the predictive usefulness of these tests.[200] These doubts are reflected in the scholarly literature on this subject.[201]

Dr. Fason made another appearance, saying that Fisher would be incapable of complying with terms of commitment such as a requirement of regular written assignments.[202] Ms. Pritchard was only able to elicit such testimony in terms of a "hypothetical," because the court would not allow the jurors to know the actual consequences of their verdict.[203] For example, at no point did the court allow the jury to know that, if they found Fisher to be a "sexually violent predator," he would be placed in *outpatient* commitment. Likewise, they were not made aware of the many elaborate provisions of his commitment "contract," or that the violation of any provision thereof would lead to a third-degree felony charge.

Ms. Pritchard tried, unsuccessfully, to bring these facts to light during direct examination of Mr. Fisher's mother. The court sustained the State's objections to questions like, "Mrs. Fisher, do you want Mike to be subjected to a third degree felony?" and "Mrs. Fisher, hypothetically, if Michael was given 97 conditions by which to comply or

195. *See id.* at 74–78.

196. *See id.* at 49–50.

197. *Id.* at 56.

198. *See id.* at 78.

199. *See id.* at 77–78.

200. *See* Transcript of Record vol. 4 at 152–81, *In re* Commitment of Fisher, 164 S.W.3d 637 (Tex. 2005) (No. 00-10-06622-CV) [hereinafter Transcript vol. 4] (copy on file with author).

201. *See, e.g.*, TERENCE W. CAMPBELL, ASSESSING SEX OFFENDERS: PROBLEMS AND PITFALLS 83–109 (2004) (questioning validity and reliability of the Static-99 and the MnSOST-R); DENNIS M. DOREN, EVALUATING SEX OFFENDERS: A MANUAL FOR CIVIL COMMITMENTS AND BEYOND 125–31 (2002) (same).

202. *See* Transcript vol. 4, *supra* note 200, at 55–56.

203. *See id.* at 55.

else he would be subjected to a third degree felony . . . would he be able to comply with those 97 conditions?"[204]

Judge and prosecutor maintained the fiction that the court might tailor the conditions of commitment, rather than rely on the 97 conditions printed in the "Civil Commitment Requirements Treatment and Supervision Contract."[205] Ms. Pritchard tried to introduce this document into evidence, but the court excluded the "contract" with the 97 provisions as "hearsay."[206]

In closing, Ms. Pritchard, arguing for Fisher, pointed out the unreliability of both the psychological tests and the State's experts.[207] She was not allowed to mention the ramifications of an affirmative verdict—outpatient commitment with impossible requirements.[208] Mr. Thetford argued for the State, emphasizing how important it was "to ensure that people like Fisher get the help that they need."[209]

There are two elements that must be proven beyond a reasonable doubt in order to label someone a "sexually violent predator": (1) that the person is a repeat sex offender and (2) that the person "suffers from a behavioral abnormality that makes the person likely to engage in a predatory act of sexual violence."[210] Because Fisher's "Pen Packs"—state documents reflecting his convictions—were admitted into evidence, the court granted a directed verdict as to the first element.[211] Fisher had been convicted of two prior sexual assaults. Therefore, the court ultimately charged the jury with one question only: "Do you find that Michael Fisher suffers from a behavior abnormality that makes him likely to engage in a predatory act of sexual violence?"[212] The jury returned with the answer "yes" in less than two and a half hours.[213]

B. *Commitment of Fisher v. State*

Normally, an appeal from a civil commitment under § 841 would go to the Ninth District Court of Appeals in Beaumont.[214] Due to a clogged docket, however, the *Fisher* appeal went to the Thirteenth District in Corpus Christi.[215] This would prove important later because it led to a split among the Texas courts of appeal.

204. *Id.* at 143–44.
205. *See id.* at 118–22.
206. *See id.*
207. *See* Transcript vol. 5, *supra* note 134, at 18–35.
208. *See id.* at 35.
209. *Id.* at 52–53.
210. TEX. HEALTH & SAFETY CODE ANN. § 841.003 (Vernon 2003).
211. *See* Transcript vol. 5, *supra* note 134, at 4–5.
212. *Id.* at 16.
213. *See id.* at 74–76.
214. *See* Counsel Interview, *supra* note 119.
215. *See id.*

1. Fisher's Argument

On appeal in the Thirteenth District, Fisher, now represented by Kenneth Balusek of the State Counsel for Offenders, argued that SVP proceedings are "quasi-criminal" because they can result in deprivation of liberty and should therefore trigger criminal due process protections.[216] If due process applies, the argument developed, it cannot be enjoyed by someone who does not comprehend the hearing, and Fisher's right to attend the hearing and have an attorney was "'a hollow right'" because he could not understand the proceedings or assist counsel.[217] He also alleged that the order of commitment was unconstitutionally vague and that requiring Fisher to testify at the hearing violated his Fifth Amendment right against self-incrimination.[218]

2. The State's Argument

The State countered that involuntary commitment "'does not itself trigger the entire range of criminal protections'" and that the SVP statute was not "quasi-criminal" because the "United States Supreme Court [had] consistently held such statutes to be *civil* in nature."[219] The State further argued that the granting of some criminal procedural rights under the SVP statute did not transform the proceeding from civil to criminal.[220] To this the court agreed.[221] Because the statute is civil, and not criminal or "quasi-criminal" in nature, the State contended, Fisher had no due process right in being sane at the hearing or being able to assist counsel.[222] To this the court did not agree.[223]

3. The Opinion

The Chief Justice of the Supreme Court of Texas assigned retired Justice Don Wittig to preside over the case, and Wittig authored the opinion for the Corpus Christi Court of Appeals.[224] The court did not reach Fisher's arguments about the statute being unconstitutionally vague or violating his Fifth Amendment right against self-incrimina-

216. *See* Commitment of Fisher v. State, 123 S.W.3d 828, 834–35 (Tex. App.—Corpus Christi 2003) (en banc), *rev'd sub nom. In re* Commitment of Fisher, 164 S.W.3d 637 (Tex. 2005), *cert. denied*, 126 S. Ct. 428 (2005).

217. *Id.* at 835.

218. *Id.* at 831.

219. *Id.* at 835 (citing Seling v. Young, 531 U.S. 250, 260–61 (2001)); *see also* Kansas v. Hendricks, 521 U.S. 346, 361–65 (1997) (holding the Kansas SVP statute to be civil, not criminal); Allen v. Illinois, 478 U.S. 364, 372 (1986) (holding that proceedings under Illinois's "Sexually Dangerous Persons Act" are not criminal).

220. *See Commitment of Fisher*, 123 S.W.3d at 835.

221. *Id.*

222. *Id.*

223. *Id.*

224. *Id.* at 831 & n.1.

tion, focusing instead on the issue of his mental capacity.[225] It distinguished *Allen v. Illinois*, a case relied on by the State, because it involved "actual treatment in a psychiatric hospital."[226] The fact that incarceration may result for Fisher is "uniquely the case in Texas" and is "relevant to the question whether the privilege against self-incrimination applies." The court divided the analysis into two main parts: (1) Fisher's liberty and due process claims, and (2) whether the statute is punitive.

a. Liberty and Due Process

The court immediately acknowledged Fisher's liberty interest in the proceeding, which rendered substantive and procedural due process "mandatory."[227] Unlike most states, Texas has no dual requirement of "current mental illness and dangerousness."[228] Citing numerous precedents, the court maintained that "'there is no conceivable basis for distinguishing the commitment of a person who is nearing the end of a penal term from all other civil commitments.'"[229] "'Freedom from bodily restraint has always been at the core of the liberty protected by due process from arbitrary governmental action.'"[230] "'It is clear that commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection.'"[231]

Significantly, the court noted that a mental incompetent cannot be held to a contract.[232] "[I]f a person cannot contract away his property without mental capacity, can the government force an incompetent to sign a civil commitment contract the person cannot comprehend or keep? May mentally retarded persons sign away their liberties? Fisher was ordered to sign such a contract."[233] The opinion went on to state that people do not lose their fundamental rights simply by virtue of mental illness.[234] The Texas SVP act does not provide equal protection for the mentally ill or retarded.[235] It also does not provide for a finding that the person cannot control his sexual impulses, as mandated by the Supreme Court.[236] The statute provides for assistance of counsel, but fails to ensure that the person be able to enjoy that right, as required by due process.[237] Therefore, the court concluded, the statute was unconstitutional as applied to Fisher, regard-

225. *Id.* at 831.
226. *Id.* at 835 (comparing with Allen v. Illinois, 478 U.S. 364, 373 (1986)).
227. *Id.* at 836.
228. *Id.* (comparing with Foucha v. Louisiana, 504 U.S. 71, 78 (1992)).
229. *Id.* (quoting Jackson v. Indiana, 406 U.S. 715, 724 (1972)).
230. *Id.* (quoting Youngberg v. Romeo, 457 U.S. 307, 316 (1982)).
231. *Id.* (quoting Jones v. United States, 463 U.S. 354, 361 (1983)).
232. *Id.* at 837 (citing Dexter v. Hall, 82 U.S. 9, 21 (1872)).
233. *Id.* at 837.
234. *See id.* at 837 (citing Barclay v. Campbell, 704 S.W.2d 8, 11 (Tex. 1986)).
235. *See id.* at 837.
236. *Id.* at 838 (citing Kansas v. Crane, 534 U.S. 407, 412 (2002)).
237. *See id.*

less of whether it was fundamentally civil or quasi-criminal in nature.[238]

b. Civil or Criminal?

In addressing the question whether the SVP statute is punitive and therefore criminal, the court began by enumerating the criminal law safeguards it does and does not provide. The statute provides for findings beyond a reasonable doubt, right to counsel, and trial by jury, but does not provide for the right of competency, the right against self-incrimination, or protections from double jeopardy or ex post facto application.[239]

The court conceded that some of the State's arguments had merit: (1) that if the statute is civil, the "as applied" argument may fail, (2) that Fisher's claim that he is "doomed to violate the terms of commitment" is not certain, and (3) that if he does violate the terms he will have an opportunity to challenge the criminal penalty when it actually applies to him.[240] Acknowledging that *Hendricks* is the leading case in this area, the court noted Justice Kennedy's concurrence in that case warning that "mental and medical treatment should not be a sham for punishment."[241] Conceding that the Texas SVP statute is similar to the Kansas law held constitutional in *Hendricks*, the court noted "striking and material differences . . . ."[242]

The best way to explore these differences, the court decided, was to apply the same test that the *Hendricks* court applied. First is the question of statutory construction: "If the Legislature meant to establish 'civil' proceedings, we should ordinarily defer to its intent unless there is the clearest proof that the scheme is so punitive in purpose or effect that it negates the State's attempt to deem that statute civil."[243] In search of this "clearest proof," courts look to various factors articulated by the United States Supreme Court in *Kennedy v. Mendoza-Martinez*:

> Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of scienter, whether its operation will promote the traditional aims of punishment—retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned.[244]

238. *Id.*
239. *Id.* at 838 n.8.
240. *See id.* at 839.
241. *Id.* (citing Kansas v. Hendricks, 521 U.S. 346, 371 (1997) (Kennedy, J., concurring)).
242. *Id.*
243. *Id.* at 839–40 (citing *Hendricks*, 521 U.S. at 361).
244. Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168–69 (1963).

The Thirteenth District Court of Appeals in Corpus Christi did not examine all of these factors, but it addressed several of them.

The court observed that, unlike the Kansas SVP statute, the Texas statute, unique among all the states, "imposes severe criminal penalties for the violation of any of the terms of commitment."[245] It then considered the ramifications of such a violation. Most people committed under the statute (not including, for example, those found not guilty by reason of insanity of a sexually violent crime) have at least two prior felony convictions, which would automatically lead to an enhanced sentence of 25–99 years in prison.[246] If the prior felony is an aggravated sexual assault, the person faces a mandatory life sentence.[247] As a result, "[i]n practical legal effect, if Fisher or anyone with a prior aggravated sexual assault conviction, uses a post office box or stops to help a person 'stranded on the road' that person is subject to a mandatory life sentence."[248]

Thus, the court concluded, the statute was criminal because it embraced the two objectives of criminal punishment: retribution and deterrence.[249] The statute was retributive because it punished for past criminal conduct and was a deterrent because the violation of its terms could lead to a lengthy term of imprisonment.[250] Labeling the statute "civil" could not alone save it from being criminal, nor could placing it in the Health and Safety Code rather than the Criminal Code.[251] The court noted that many criminal provisions appear in Texas's Health and Safety Code, including various drug crimes.[252]

To underscore the clear punitive purpose of the Texas SVP statute, the court asked a rhetorical question:

> If the State's true intent was to treat Fisher, why was he not offered or required to undergo treatment before his release from prison? And now after his release . . . he is not given the alternative of inpatient or other mental health treatment. Rather, under the judgment, his alternative to the 100–plus terms of commitment is a life sentence in the penitentiary.[253]

The 108 restraints on Fisher's liberty "far exceed[ed] normal criminal law probation or community supervision" and created "a general deterrent effect" impermissible in a non-criminal context.[254] The conditions "can hardly be said to [have been] less restrictive or coercive

245. *Commitment of Fisher*, 123 S.W.3d at 840.
246. *See id.*
247. *Id.*
248. *Id.*; *see also id.* at 855 (referencing items 48 and 55 of the Civil Commitment Requirements: Treatment and Supervision Contract).
249. *See Commitment of Fisher*, 123 S.W.3d at 840.
250. *See id.*
251. *See id.* at 841.
252. *See id.*
253. *Id.* at 842 n.17.
254. *Id.* at 844.

than the conditions of a patient at a Texas mental institution."[255] Indeed, it went on, the restrictions were "more onerous than conventional civil commitment" and even "more onerous than many comparable penal provisions."[256] Furthermore, the disabilities placed on Fisher "[were] not tailored to his individual needs but rather represent[ed] a net cast to the broadest reach of possible variables."[257] Therefore, the statute was "excessive in relation to the alternative purpose assignable to it," said "alternative purpose" being treatment.[258]

The court acknowledged that the law does not require the State to provide adequate treatment but can commit the untreatably insane if they pose a danger to others.[259] If, however, the question of treatment is irrelevant, there must be a finding of "lack of control."[260] This, the court asserted, was the requirement of *Kansas v. Crane*, one of the progeny of *Hendricks* that emphasized the distinction that must be drawn between sex offenders subject to civil commitment and "other dangerous persons more properly dealt with in criminal proceedings . . . 'lest "civil commitment" become a "mechanism for retribution or general deterrence."'"[261] In *Hendricks*, Hendricks himself admitted that he was unable to stop molesting children. The absence of a "lack of control" element merely lent further weight to the court's conclusion that the statute was fundamentally punitive and therefore criminal.[262] The court accordingly reversed and remanded the case.[263]

c. Collision Course

The problem raised by the Thirteenth District Court's holding was that the issue of whether the Texas SVP statute was civil or criminal had already been addressed by the Ninth District Court of Appeals in Beaumont—with opposite results.[264] In *Beasley v. Molett*, the Ninth District held, *inter alia*, that the statute was non-punitive because "restraints in the context of involuntary civil commitments have historically been treated as civil, not punitive. Commitment under the Act involves no finding of *scienter*. It does not involve retribution because

255. *Id.*

256. *Id.* at 845.

257. *Id.* at 846.

258. *Id.* (citing Kennedy v. Mendoza-Martinez, 372 U.S. 144, 169 (1963) (outlining factors used to determine if statute is civil or criminal)).

259. *See id.* at 847 (citing Kansas v. Hendricks, 521 U.S. 346, 366 (1997) (Kennedy, J., concurring)).

260. *See id.* (citing Kansas v. Crane, 534 U.S. 407, 412 (2002)).

261. *Id.* (quoting *Crane*, 534 U.S. at 412); *see also* Kansas v. Hendricks, 521 U.S. 346, 371–73 (1997) (Kennedy, J., concurring) (warning against the inherent dangers of using a civil confinement statute in conjunction with a criminal process).

262. *See Commitment of Fisher*, 123 S.W.3d at 848.

263. *Id.* at 851.

264. *See* Beasley v. Molett, 95 S.W.3d 590 (Tex. App.—Beaumont 2002, pet. denied).

it does not fix culpability for prior criminal conduct."[265] The Thirteenth District Court of Appeals in Corpus Christi noted the disagreement on the nature of the statute and made a reasonable prediction: "We trust this respectful disagreement should be and will be addressed by higher authorities."[266]

C. *In the Supreme Court of Texas*

Chief Justice Wallace Jefferson authored the opinion for the Texas Supreme Court.[267] Dan Maeso, Ken Balusek, and other attorneys with the State Counsel for Offenders represented Michael Fisher.[268] After recapitulating the general provisions of the SVP statute, the Court noted in passing that, although the State of Texas is unique in having outpatient commitment for SVPs, other states provide criminal penalties for attempting to escape from inpatient commitment.[269] Unlike the Court of Appeals, the Texas Supreme Court did not limit its analysis solely to the issue of competence, but addressed Fisher's other complaints—unconstitutional vagueness and Fifth Amendment violation—as well.[270] The Court wished to "address several aspects of the Act's constitutionality."[271] Because the Court of Appeals had not specified whether it relied on the United States or the Texas Constitution, the Court limited its analysis to the United States Constitution, with the assumption that the Texas Constitution is congruent therewith.[272] It noted that any analysis of a statute's constitutionality must begin with a presumption of validity.[273]

1. Civil or Criminal: The Complete *Kennedy* Test

The first major step in the analysis addressed Fisher's due process rights relating to his competence.[274] To make this determination, the Court had to determine whether the statute was punitive or civil.[275] Weighing in favor of a holding that it is civil were the numerous decisions by other courts holding other state's SVP statutes to be civil and non-punitive.[276] Next, like the Court of Appeals, it looked at the legislative labeling of the statute.[277] "Unquestionably, the Legislature

265. *Id.* at 607.
266. *Commitment of Fisher*, 123 S.W.3d at 848 n.27.
267. *In re* Commitment of Fisher, 164 S.W.3d 637, 639 (Tex. 2005), *cert. denied*, 126 S. Ct. 428 (2005).
268. *Id.*
269. *Id.* at 642 n.6.
270. *See id.* at 645 & n.8.
271. *Id.* at 645.
272. *See id.*
273. *Id.*
274. *See id.*
275. *Id.*
276. *See id.* at 646.
277. *See id.*

gave the Act a civil edifice."[278] Again like the lower court, however, the Court acknowledged that the "'civil label is not always dispositive'" and will be rejected if there is "'the clearest proof' that the statutory scheme [is] so punitive either in purpose or effect as to negate [the State's] intention."[279] Because courts look at legislative intent first and then at the effects of the statute, the process is known as the "intent–effects test."[280]

The Court disposed of the intent portion of the test quickly, noting only that the legislative findings refer to public safety and treatment, and not to punishment.[281] Next, turning to the effects test, the Court, like the lower court and like the U.S. Supreme Court in *Hendricks*, employed a multi-factor analysis from the 1963 case, *Kennedy v. Mendoza-Martinez*.[282] Unlike the lower court and the *Hendricks* court, however, the Texas Supreme Court did not pick and choose some *Kennedy* factors to evaluate, but looked at all of them individually.[283] Although "neither exhaustive nor dispositive," the factors outlined in *Kennedy* include:

> (1) whether the sanction involves an affirmative disability or restraint;
> (2) whether it has historically been regarded as a punishment;
> (3) whether it comes into play only on a finding of scienter;
> (4) whether its operation will promote the traditional aims of punishment—retribution and deterrence;
> (5) whether the behavior to which it applies is already a crime;
> (6) whether an alternative purpose to which it may rationally be connected is assignable for it; and
> (7) whether it appears excessive in relation to the alternative purpose assigned.[284]

The Court evaluated each of these factors under a separate subheading.

a. Affirmative Disability or Restraint

Quoting *Hendricks*, the Court noted that "'the mere fact that a person is detained does not inexorably lead to the conclusion that the government has imposed punishment.'"[285] In stark contrast to the Court of Appeals, the Supreme Court placed no emphasis on the nu-

278. *Id.* at 647.
279. *Id.* (quoting Allen v. Illinois, 478 U.S. 364, 369 (1986)); Kansas v. Hendricks, 521 U.S. 346, 361 (1997) (quoting United States v. Ward, 448 U.S. 242, 248–49 (1980) (alteration in original)).
280. *In re* Commitment of Fisher, 164 S.W.3d at 647.
281. *See id.*
282. *Id.* at 647–48; *see also* Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168–69 (1963) (outlining factors used to determine if statute is civil or criminal).
283. *In re* Commitment of Fisher, 164 S.W.3d at 647–53.
284. *Id.* at 647–48 (citing *Kennedy*, 372 U.S. at 168–69 (outlining factors used to determine if statute is civil or criminal)).
285. *Id.* at 648 (quoting Kansas v. Hendricks, 521 U.S. 346, 363 (1997)).

merous and severe restraints on Fisher's liberty imposed by the contractual requirements. Instead, it pointed out that the SVP statute imposes no physical restraint.[286] The restraints imposed on Fisher under the terms of his outpatient commitment, though real, the Court deemed to be no greater than those imposed in inpatient commitment.[287] This factor therefore pointed toward the statute being non-punitive.[288]

b. Historical View

Civil commitment has not traditionally been considered punitive. Again, relying on *Hendricks*, the Court asserts the confinement of the dangerously mentally ill to be a "'classic example of non-punitive detention.'"[289] Ignoring, for the time being, the criminal penalties associated with the violation of the outpatient commitment provisions, the Court essentially equates the statutory scheme under the Texas SVP statute with any other civil commitment. Therefore, the historical view also tilts toward a non-punitive finding.[290]

c. Retribution, Deterrence, and Scienter

Although the *Kennedy* Court analyzed *scienter* separately from retribution and deterrence, the Texas Supreme Court chose, without explanation, to combine them in its *Fisher* analysis.[291] It disposed of retribution quickly, saying simply that "the Act is not retributive because it does not fix liability for prior criminal conduct . . . . Instead, such conduct is used for evidentiary purposes."[292] It also pointed out that some people who are not convicted (*e.g.*, those acquitted by reason of insanity) may also be placed under civil commitment.[293]

With respect to *scienter*, the *mens rea* or "guilty mind" requirement of much criminal law, the Court found none under the SVP statute.[294] Instead, the commitment determination is based on the person's "behavioral abnormality" without regard to any criminal intent.[295] The Court of Appeals, the opinion went on, was incorrect to focus on the intent to commit the underlying crimes that qualified the person for SVP commitment.[296] The Court noted that *scienter* would be required

286. *Id.*
287. *Id.*
288. *Id.*
289. *Id.*
290. *Id.*
291. *See id.* at 648–50.
292. *Id.* (citing Kansas v. Hendricks, 521 U.S. 346, 362 (1997)).
293. *See id.* at 649.
294. *Id.*
295. *Id.*
296. *See id.*

to convict a person for violating a condition of commitment, but this would be a separate inquiry in the context of a criminal trial.[297]

On deterrence, the Court opined that the SVP statute could not act as a deterrent because those committed under it, having a "behavioral abnormality," are unlikely to be deterred. Again the analogy is to *Hendricks*, where "'persons committed under the [Kansas] Act are, by definition, suffering from a "mental abnormality" or a "personality disorder" that prevents them from exercising adequate control over their behavior.'"[298] The Court fails to address whether such an inability to control one's behavior could make it difficult, if not impossible, to adhere to the terms of outpatient commitment. Rather, it praises the outpatient program as less restrictive than the Kansas program, where SVPs are confined in secure facilities.[299] An "incidental deterrent effect," it added, would not suffice to make the statute punitive.[300]

d. Whether the Act Applies to Behavior Already a Crime

If a statute applies to behavior that is already a crime, it is more likely to be found punitive.[301] Although the vast majority of SVPs are categorized as such based on prior convictions for sexually violent offenses, the Court was able to dispose of this factor easily by pointing out that people found not guilty by reason of insanity may also face commitment under the statute.[302] Thus, "[b]ecause the Act does not categorically apply only to convicted individuals, this factor does not weigh in favor of finding that the Act is punitive."[303]

e. Rational Connection to Non-punitive Purpose

The Court recognized the state's twofold interest in passing the SVP statute, and these should ring familiar: (1) its *parens patriae* power to care for people unable to care for themselves, and (2) its police powers to protect the public from dangerous individuals.[304] The Court had no difficulty finding the statute connected to the State's goals of long-term supervision and treatment, and did not attempt to address whether it approached these goals adequately or even rationally.

f. Excessiveness

The Court of Appeals had held that the statute was excessive because the disabilities placed on Fisher "[were] not tailored to his indi-

297. *See id.* at 649 n.12.
298. *Id.* at 649 (quoting Kansas v. Hendricks, 521 U.S. 346, 362–63 (1997)).
299. *See id.* at 650.
300. *Id.*
301. *Id.*
302. *See id.* at 650–51.
303. *Id.* at 651.
304. *Id.*

vidual needs but rather represent[ed] a net cast to the broadest reach of possible variables."[305] In the Texas Supreme Court's view, because of the felony charges associated with violating the provisions of outpatient commitment, "the Texas Act appears at once less restrictive and potentially more restrictive than its out-of-state counterparts."[306] The Court found precedents for criminal penalties associated with the violation of civil statutes, noting that the U.S. Supreme Court had held these constitutional.[307] Notably, these laws included sex offender registration laws, under which failure to register was a crime.[308] On balance, "the freedom from confinement outweighs the criminal sanction imposed for a failure to obey the commitment conditions."[309] The Court reiterated its view that the outpatient regime in Texas is "far less restrictive" than the inpatient commitment scheme in Kansas that the U.S. Supreme Court had held constitutional in *Hendricks*.[310]

Because the Court found that all the factors (or "useful guideposts") under *Kennedy* pointed toward a non-punitive statute, Fisher had failed to provide the "clearest proof" that the statute was punitive in effect. Therefore, the Court would proceed under the assumption that it was civil.[311]

The striking thing about the *Kennedy* factors analysis is its subjectivity. Although the Court of Appeals did not address all of the factors, no doubt any one of them could be decided either way in this case. The excessiveness factor, for instance, and the diametrically opposite views on it taken by the Court of Appeals and the Texas Supreme Court, is perhaps the most glaring example of this subjectivity. The importance of this consideration should not be underestimated: virtually all else in the decision hinged on whether the statute was civil or criminal, and choosing to regard it as civil through a subjective analysis determined the rest of the case.

2. A House of Cards

Fisher's argument on competence failed because competency hearings are not required for civil proceedings.[312] Moreover, by their very nature, civil commitments often involve individuals who would be incompetent to stand trial.[313] Were Fisher to violate the terms of his

305. *See* Commitment of Fisher v. State, 123 S.W.3d 828, 846 (Tex. App.—Corpus Christi 2003) (en banc), *rev'd sub nom. In re* Commitment of Fisher, 164 S.W.3d 637 (Tex. 2005), *cert. denied*, 126 S. Ct. 428 (2005).

306. *In re* Commitment of Fisher, 164 S.W.3d at 652.

307. *See id.*

308. *See id.* at 652–53 (citing cases arising out of state statutes imposing criminal penalties for violations of civil statutes).

309. *Id.* at 652.

310. *See id.* at 653.

311. *See id.*

312. *See id.* at 654.

313. *See id.* at 653–54.

commitment, he would be afforded full criminal due process in any trial for the resulting felony charge.[314] He would be entitled to a competency hearing at that time.[315] In addition, if "incompetence dooms him to violate the court's commitment order, Fisher may raise lack of scienter as a defense in any such criminal proceeding."[316] Similarly, Fisher's Fifth Amendment claim failed, in part because there was no specific question at the commitment hearing that subjected Fisher to future criminal liability.[317]

On the issue of vagueness, Fisher made a threefold argument: (1) the Act is vague because it fails to individualize treatment; (2) its "behavioral abnormality" label is vague because it does not reflect a medical diagnosis; and (3) the provisions of the "Treatment and Supervision Contract" are vague (especially with regard to who is "a potential victim") and allow arbitrary enforcement.[318] The Court noted that Fisher had failed to preserve the vagueness issue below, but rather than decide whether a facial vagueness challenge must be preserved at trial to be addressed on appeal, the Court chose to point out why it would fail anyway.[319]

Fisher would bear "the heavy burden of showing that the Act is unconstitutional in every possible application."[320] In addressing Fisher's first vagueness argument, the Court correctly asserted that the trial court has discretion to tailor the commitment restrictions to suit the individual SVP.[321] It neglected to mention that such tailoring simply does not occur in practice.[322] On Fisher's second vagueness point, the Court observed that the language in the Texas statute regarding "behavioral abnormality" is quite similar to language in other states' SVP statutes, such as the phrase "mental abnormality" in the Kansas SVP statute, which was held constitutional in *Hendricks*.[323] Furthermore, "the United States Supreme Court has 'never required state legislatures to adopt any particular nomenclature in drafting civil

314. *See id.* at 654.
315. *Id.*
316. *Id.*
317. *Id.*
318. Respondent's Brief on the Merits at 18–20, *In re* Commitment of Fisher, 164 S.W.3d 637 (Tex. 2005) (No. 04-0112).
319. *See In re* Commitment of Fisher, 164 S.W.3d at 654–55.
320. *Id.* at 655.
321. *Id.*
322. *See* Counsel Interview, *supra* note 119; Commitment of Fisher v. State, 123 S.W.3d 828, 852–58 (Tex. App.—Corpus Christi 2003) (en banc) (reproducing the Civil Commitment Requirements: Treatment and Supervision Contract), *rev'd sub nom. In re* Commitment of Fisher, 164 S.W.3d 637 (Tex. 2005), *cert. denied*, 126 S. Ct. 428 (2005). In order to demonstrate that the same contractual commitments are imposed on all committed SVPs, Dixie Pritchard of the State Counsel for Offenders attempted unsuccessfully to have the Treatment and Supervision Contract introduced as evidence at Fisher's commitment hearing. *See* Transcript vol. 4, *supra* note 200, at 118–22.
323. *In re* Commitment of Fisher, 164 S.W.3d at 655–56.

commitment statutes.'"[324] In short, legal terms need not reflect medical diagnoses.[325]

Finally, the fact that some of the contractual requirements of outpatient commitment are inappropriate for Fisher was really an argument that the Act is unconstitutional as applied to *him*.[326] Again, the Court had already made clear that Fisher would have to prove the statute unconstitutional in all applications.[327] Moreover, the Court continued, had Fisher raised this issue at trial, the trial court might have modified some of the conditions at his request.[328] Again, this ignores reality. Nevertheless, all of Fisher's arguments failed. The Court reversed the judgment of the Court of Appeals and rendered judgment civilly committing Fisher as specified in the trial court's original order.[329]

V. THE AFTERMATH: STATUTORY CHANGES AND RECOMMENDATIONS

In 2003, and again in 2005, the Texas Legislature made substantive revisions to the SVP statute. For example, in 2005, § 841.150 of the Texas Health and Safety Code transformed substantially. The section, originally added in 2003, had been entitled "Effect of Certain Subsequent Convictions, Judgments, or Verdicts on Order of Civil Commitment."[330] It provided for the suspension of outpatient commitment during any period of incarceration. The 2005 version bears the title "Effect of Subsequent Commitment or Confinement on Order of Civil Commitment."[331] It too provides for suspension of outpatient commitment during confinement, but emphasizes inpatient commitment in a community center, mental health facility, or state school.[332] This change seems to somewhat clarify the relationship between outpatient commitment of SVPs and inpatient commitment of the mentally ill under the older statute.[333] In other words, if a person is involuntarily committed to an inpatient facility under § 574, his outpatient commitment under § 841 is suspended for the duration of his confinement. Dan Maeso, who represented Michael Fisher before the Texas Supreme Court, informed the Author that Fisher is now on inpatient

324. *Id.* at 656 (quoting Kansas v. Hendricks, 521 U.S. 346, 359 (1997)).
325. *See id.*
326. *See id.*
327. *See id.* at 655.
328. *Id.* at 656.
329. *Id.*
330. TEX. HEALTH & SAFETY CODE ANN. § 841.150 (Vernon 2003).
331. TEX. HEALTH & SAFETY CODE ANN. § 841.150 (Vernon Supp. 2006).
332. *See id.*
333. *See* TEX. HEALTH & SAFETY CODE ANN. §§ 574.001 to .154 (Vernon 2003 & Supp. 2006).

psychiatric commitment in Kerrville State Hospital.[334] This outcome is remarkably like the recommendation of Dr. Jennings at Fisher's SVP commitment hearing.[335]

Another recent change to the SVP statute allows the court to appoint outside counsel for alleged SVPs if no representative of the Office of the State Counsel for Offenders is available.[336] New changes have also softened language directing the State's "multidisciplinary team" of experts to "assess" rather than "determine" whether an individual is a sexually violent predator.[337] Another substantive change to the statute provides that, if an alleged SVP refuses to cooperate with the multidisciplinary team during their assessment, this may be used as evidence against him at trial. In addition, he may not be able to have his own experts testify, and he may face contempt charges.[338]

Perhaps the most significant change to the statute comes under "Commitment Requirements."[339] The court must now require the committed SVP "to reside in a Texas residential facility under contract" with the Council on Sex Offender Treatment.[340] This change should allow closer supervision of the committed person, reducing the likelihood of violations, and may represent a step in the right direction.[341] This "halfway house" approach also begins to resemble inpatient commitment, with potential increases in quality of treatment, public safety, and, naturally, expense.

The question remains: What is the real purpose of the Texas SVP statute? It has been described as merely a "feel good" statute allowing legislators to appear tough on sex offenders and as a cheap "funnel" back to the penitentiary.[342] If the purpose of the statute is punitive, as the Court of Appeals held, the accused should, at the very least, be afforded criminal due process rights during the commitment proceeding, including the right to be competent to stand trial. A competency determination would, among other things, have the salutary effect of indicating whether commitment under § 841, the SVP statute, is called for, or whether inpatient commitment under the older § 574 of the Health and Safety Code is more appropriate.

Of course, the real problem with recognizing the punitive nature of the statute is the constitutional issues that would re-emerge as a result. If the statute is punitive, then the commitment would violate the double jeopardy and ex post facto prohibitions of the United States

334. *See* Telephone Interview with Dan Maeso, formerly of the State Counsel for Offenders (Oct. 29, 2005) [hereinafter Maeso Interview] (notes on file with author).
335. *See* Transcript vol. 2, *supra* note 136, at 151–53.
336. *See* TEX. HEALTH & SAFETY CODE ANN. § 841.005(b) (Vernon Supp. 2006).
337. *See id.* § 841.022(c).
338. *Id.* § 841.061(f).
339. *See id.* § 841.082.
340. *Id.* § 841.082(a)(1).
341. *See* Counsel Interview, *supra* note 119.
342. *Id.*

Constitution, as the *Hendricks* court recognized when evaluating the Kansas SVP statute.[343] But if the statute's purpose is actually punitive, there are more forthright ways to punish sex offenders than resorting to an unconstitutional commitment regime. One simple solution could be longer prison sentences for sex crimes, as exemplified by the recently-passed Lunsford Act in Florida.[344] Alternatively, the State could keep the existing criminal penalties and limit plea bargains for sex offenses.[345] Often, prosecutors offer plea bargains to sex offenders to avoid bringing child witnesses, who may be traumatized by the experience, to testify.[346] Another, less laudable reason, is that the prosecutors know that the offender will be civilly, and indefinitely, committed under the SVP statute immediately upon release from prison.[347] Why bother sentencing to a long term of years when you can commit for a lifetime?

The statute does have its defenders, however. Dr. Rahn Bailey, a psychiatrist who frequently serves on the multidisciplinary team assessing alleged SVPs, has praised the state's "moderate approach."[348] While acknowledging that controversy exists among clinical professionals about this type of commitment, Dr. Bailey wrote, "Texas, by using the least restrictive alternative of outpatient treatment is able to provide civil commitment at a greatly diminished cost."[349] Other writers have praised this "innovative" program, even suggesting that, if successful, "it should serve as model for other states and communities."[350]

How successful is it? The Executive Director of the Council on Sex Offender Treatment, the state organization responsible for the treatment and supervision of SVPs, was kind enough to provide the Author recent statistics on the program. As of November 2006, Texas has placed sixty-eight SVPs on outpatient commitment.[351] Twenty-seven of these are currently living in the community.[352] Twenty-nine have returned to prison.[353] Five have returned to prison twice.[354]

343. *See* Kansas v. Hendricks, 521 U.S. 346, 361 (1997); U.S. CONST. art. I, § 9, cl. 3; U.S. CONST. amend. V.

344. *See Florida Governor Signs Jessica Lunsford Act*, USA TODAY, May 2, 2005, http://www.usatoday.com/news/nation/2005-05-02-lunsford-act_x.htm?POE=NEWISVA.

345. Maeso Interview, *supra* note 334.

346. *See* Counsel Interview, *supra* note 119.

347. *See id.*

348. Bailey, *supra* note 111.

349. *Id.*

350. Walter J. Meyer et al., *Outpatient Civil Commitment in Texas for Management and Treatment of Sexually Violent Predators: A Preliminary Report*, 47 INT'L J. OF OFFENDER THERAPY & COMP. CRIMINOLOGY 396, 405 (2003).

351. E-mail from Allison Taylor, Executive Director, Council on Sex Offender Treatment, to author (Nov. 13, 2006, 09:51:57 CST) (on file with author).

352. *Id.*

353. *Id.*

354. *Id.*

None of the violations leading to re-arrest or re-incarceration involved a sexual offense.[355]

Outpatient commitment may be appropriate for some offenders. It clearly was not appropriate for Michael Fisher. It is difficult to understand why the State of Texas is so reluctant to provide criminal due process rights to offenders during SVP hearings. If part of the rationale behind the statute is that sex offenders are not mentally ill and are therefore "not amenable to traditional mental illness treatment modalities,"[356] then it should follow that someone who *is* mentally ill and *could* benefit from "traditional mental illness treatment modalities" is a poor candidate for SVP labeling. Providing criminal due process rights, including the right to be competent at trial, would weed out mentally ill individuals like Fisher. Commitment proceedings could then occur under the older Texas Mental Health Code § 574. This would provide better protection to the public and more appropriate treatment for the mentally ill, thus serving the two rationales underlying civil commitment: police power and *parens patriae.*

VI. CONCLUSION

Texas has a unique approach to handling "sexually violent predators." Unlike the other seventeen states with SVP statutes providing for inpatient civil commitment, Texas is alone in providing outpatient commitment for those found to be "sexually violent predators." This unique solution brings with it unique problems. *In re Commitment of Fisher* gives insight into the workings and shortcomings of the Texas SVP statute.

It is questionable whether the outpatient regime serves the traditional twin purposes of civil commitment: protecting the public (police power) and treating the individual (*parens patriae*). In practice, it also appears that the statute is punitive in both purpose and effect. Because of this punitive nature, at the very least, an individual facing civil commitment as an SVP should be afforded criminal due process rights, including the right to be competent at the commitment hearing. Those found incompetent could then be excluded from the SVP category and committed to inpatient treatment under the older civil commitment statute, Texas Mental Health Code § 574. However, if the statute were recognized as punitive, it would also be unconstitutional because it violates the ex post facto and double jeopardy prohibitions of the United States Constitution.[357]

Other solutions to the problem of repeat sex offenders that might be superior to the current outpatient commitment scheme include longer prison sentences for sex offenders and limiting plea bargains

355. *Id.*
356. TEX. HEALTH & SAFETY CODE ANN. § 841.001 (Vernon 2003).
357. *See* U.S. CONST. art. I, § 9, cl. 3; U.S. CONST. amend. V.

for sex offenses. Another, admittedly costly solution would be to provide for inpatient commitment as practiced in other states. In the last two years, the Texas SVP statute has undergone changes that appear to be marginal improvements. For example, the statute now requires committed SVPs to reside in a "halfway house" environment, thereby hopefully providing better treatment for offenders and better protection for the public. More fundamental changes are needed, however, if Texas law on sex offenders is ever to emerge from the shadows.

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