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The Blurry Line Between "Mad" and "Bad": Is "Lack-of-Control" a Workable Standard for Sexually Violent Predators?

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CASENOTE

THE BLURRY LINE BETWEEN "MAD" AND "BAD": IS "LACK-OF-CONTROL" A WORKABLE STANDARD FOR SEXUALLY VIOLENT PREDATORS?

I. INTRODUCTION

In January 1993, thirty-one-year-old Michael Crane entered a tanning salon in Johnson County, Kansas and exposed himself to the nineteen-year-old female attendant.[1] Thirty minutes later, he entered a nearby video store and waited for all of the customers to leave.[2] Once the store was empty, Crane exposed himself to the twenty-year-old female clerk, threatened to rape her, grabbed her by the back of the neck, and demanded that she perform oral sex on him.[3] He then suddenly and abruptly stopped the attack and ran out of the store.[4]

Crane was convicted of lewd and lascivious conduct for the tanning salon incident, and attempted aggravated criminal sodomy, attempted rape, and kidnapping for the video store incident.[5] He was sentenced to thirty-five years to life in prison.[6] The Supreme Court of Kansas reversed the attempted aggravated sodomy and attempted rape convictions based on the State's failure to charge the necessary elements.[7] The court also reversed

1. State v. Crane, 918 P.2d 1256, 1258 (Kan. 1996).
2. *Id.* at 1259.
3. *Id.*
4. *Id.*
5. *Id.* at 1258.
6. *Id.*
7. *Id.* at 1265–69.

the conviction of kidnapping because of a lack of evidence.[8] After refiling the charges, the state entered into a plea agreement with Crane in which he pled guilty to one count of aggravated sexual battery.[9] He was released from jail within five years.[10]

Release for Crane did not, however, equal freedom. His criminal history and antisocial personality subjected him to the Kansas Sexually Violent Predator Act,[11] which was intended "to address the special needs of sexually violent predators and the risks they present to society" by creating "a separate involuntary civil commitment process for the potentially long-term control, care and treatment" for such offenders.[12] As one of Crane's victims stated, the statute provides an "option later down the road" to ensure that individuals like Crane cannot re-offend.[13]

As of 1997, seventeen states had enacted sexually violent predator laws that allow for the involuntary civil commitment of sexual offenders upon completion of their criminal sentence.[14] In most instances, this legislation occurred in response to the sexual murder of a child or a young woman committed by a person with a history of sexual violence, as these events created intense public concern that the criminal justice system was inadequate in preventing sex offenders from repeating similar crimes.[15] The enactment of these statutes, however, raised numerous constitutional challenges.[16] While the decisions of lower courts have been mixed,[17] the United States Supreme Court upheld the application of sexually violent predator laws in Kansas and Washington.[18]

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8. *Id.* at 1271–73.

9. Brief for Respondent at 2, Kansas v. Crane, 122 S. Ct. 867 (2002) (No. 00-957).

10. *See id.* at 2–3.

11. KAN. STAT. ANN. §§ 59-29a01 to -a20 (1994 & Supp. 2000).

12. *Id.* § 59-29a01.

13. *In re* Crane, 7 P.3d 285, 287 (Kan. 2000).

14. *See* Kansas v. Hendricks, 521 U.S. 346, 388 (1997) (Breyer, J., dissenting). According to Justice Breyer, Arizona, California, Colorado, Connecticut, Illinois, Iowa, Kansas, Massachusetts, Minnesota, Nebraska, New Jersey, New Mexico, Oregon, Tennessee, Utah, Washington, and Wisconsin each enacted a statutory scheme for the civil commitment of sex offenders. *Id.* app. at 397–98.

15. Roxanne Lieb et al., *Sexual Predators and Social Policy*, *in* 23 CRIME & JUSTICE: AN ANNUAL REVIEW OF RESEARCH 43, 66 (Michael Tonry ed., 1998).

16. *See, e.g.*, Seling v. Young, 531 U.S. 250, 256 (2001) (reviewing claims that Washington's law violated the Double Jeopardy, Ex Post Facto, Due Process, and Equal Protection Clauses of the United States Constitution).

17. *Compare* Young v. Weston, 898 F. Supp. 744, 751, 753–54 (W.D. Wash. 1995) (invalidating Washington's law as violating substantive due process requirements, Ex Post Facto, and Double Jeopardy Clauses), *vacated*, 122 F.3d 38 (9th Cir. 1997), *with In re* Young, 857 P.2d 989, 999–1000 (Wash. 1993) (upholding Washington's law against substantive due process, ex post facto, and double jeopardy claims).

Acceptance of these statutes, however, has not been without limitation. In *Kansas v. Crane*,[19] the Supreme Court created a new substantive due process requirement for civil confinement that has significant implications for the future of sexually violent predator legislation. The Court incorporated a "lack-of-control" standard into the necessary elements for sexually violent predator laws, requiring the state to submit "proof of serious difficulty in controlling behavior" in order to justify civil confinement.[20]

This note evaluates the viability of the "lack-of-control" standard in the legal context. Part II provides a description of the "mental illness" standards that historically formed the basis of substantive due process rights in civil commitment proceedings. Part III describes the specific principles and guidelines of the Kansas Sexually Violent Predator Act.[21] Part IV includes an analysis of the 1997 case, *Kansas v. Hendricks*,[22] in which the Court interpreted the Act and established the "volitional control" standard[23] later clarified in *Kansas v. Crane*.[24] Parts V and VI analyze the Court's holding in *Crane*, and discusses its impact in the application of sexually violent predator statutes. Finally, in Part VII, the note addresses the future direction of sexually violent predator laws, and proposes alternatives to civil commitment that may more equitably balance states' and offenders' rights.

II. THE FOUNDATION OF CIVIL COMMITMENT STANDARDS

The ability of states to restrict the liberty of their citizens derives primarily from two sources: the police power and the parens patriae power.[25] The police power authorizes states to restrain in-

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stantive due process, ex post facto, and double jeopardy claims).

18. *See Young*, 531 U.S. at 263 (upholding Washington law against ex post facto and double jeopardy claims); *Hendricks*, 521 U.S. at 360–61 (upholding Kansas's law against ex post facto and double jeopardy claims).

19. 122 S. Ct. 867 (2002).

20. *Id.* at 870.

21. KAN. STAT. ANN. §§ 59-29a01 to -a20 (1994 & Supp. 2000).

22. 521 U.S. 346 (1997).

23. *See id.* at 356–60.

24. *Crane*, 122 S. Ct. at 868–72.

25. Adam J. Falk, *Sex Offenders, Mental Illness and Criminal Responsibility: The Constitutional Boundaries of Civil Commitment after* Kansas v. Hendricks, 25 AM. J.L. & MED. 117, 124 (1999).

dividuals who threaten public safety.[26] This power is most often exercised in actions taken by the state to incarcerate criminals.[27] The other source of power stems from the parens patriae principle, which provides the states with the authority to protect individuals who lack the ability to care for themselves.[28]

These two powers, while fundamentally different in principle, frequently overlap when states are faced with individuals who are both mentally ill and dangerous.[29] Together, they provide states with the ability to confine an individual against his will when there is sufficient evidence that his mental condition makes him a danger to himself or others.[30]

A. *The Development of Civil Commitment Jurisprudence*

The United States Supreme Court first established substantive restrictions on state civil commitment practices in *Jackson v. Indiana*.[31] In *Jackson*, the Court held that "due process requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed."[32] The Court further articulated the necessary standards for civil commitment in *O'Connor v. Donaldson*,[33] holding that it was unconstitutional for a state to continue to confine a harmless mentally ill person merely for preventative purposes.[34] The Court stated that "there is still no constitutional basis for confining such persons involuntarily if they are dangerous to no one and can live safely in freedom."[35]

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26. *Id.*

27. *See* Kris W. Druhm, Comment, *A Welcome Return to Draconia: California Penal Law § 645, the Castration of Sex Offenders and the Constitution*, 61 ALB. L. REV. 285, 327 (1997).

28. Falk, *supra* note 25, at 124.

29. *See, e.g.*, Addington v. Texas, 441 U.S. 418, 426 (1979).

30. *Id.*

31. 406 U.S. 715 (1972).

32. *Id.* at 738.

33. 422 U.S. 563 (1975).

34. *Id.* at 574–75.

35. *Id.* at 575.

The next significant case in civil commitment jurisprudence was *Addington v. Texas*.[36] In *Addington*, the Court held that to justify civil commitment, the Due Process Clause required the state to prove by clear and convincing evidence that the person sought to be committed was both mentally ill and required hospitalization for his own welfare and the protection of others.[37] Further, the Court outlined the scope of mental illness,[38] restricting the designation of "mentally ill" to those individuals who suffer from an ailment of the mind—rather than those who exhibit mere "idiosyncratic behavior" falling within a range of "generally acceptable conduct."[39]

The Court revisited civil commitment standards in *Jones v. United States*.[40] In *Jones*, the Court held that a detainee could be committed until such time that he is no longer mentally ill or dangerous, regardless of the amount of time he would have been criminally confined for his offense.[41] The Court also unequivocally stated that "continuing mental illness and dangerousness" were the substantive requirements of due process for civil commitment statutes.[42]

After *Jones*, the Court began to place more definite boundaries on the appropriate length of confinement. In *Foucha v. Louisiana*,[43] the Court held that the continued commitment of an acquittee is improper absent a determination in a civil commitment proceeding of current mental illness and dangerousness.[44] The Court reasoned that to hold otherwise would permit a state "to hold indefinitely any other insanity acquittee not mentally ill who could be shown to have a personality disorder that may lead to criminal conduct."[45] The Court strongly discouraged the use of civil commitment laws as a means for preventative confinement based on dangerousness alone.[46]

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36. 441 U.S. 418 (1979).
37. *Id.* at 421, 432–33.
38. *See id.* at 426–27.
39. *Id.* at 427.
40. 463 U.S. 354 (1983).
41. *See id.* at 368–69.
42. *See id.* at 368.
43. 504 U.S. 71 (1992).
44. *Id.* at 78, 86.
45. *Id.* at 82.
46. *See id.* at 82–83.

In her concurring opinion, Justice O'Connor agreed with the Court's judgment in *Foucha*,[47] but argued that its holding did not prevent states from constructing more "narrowly drawn . . . statutes that provide for punishment of persons who commit crimes while mentally ill."[48] She asserted that the confinement of insanity acquittees may be appropriate under circumstances in which "the nature and duration of detention were tailored to reflect pressing public safety concerns related to the acquittee's continuing dangerousness."[49] However, Justice O'Connor included the caveat that these individuals "could not be confined as mental patients absent some medical justification for doing so."[50] This "medical justification" standard has since been cited as one of the unofficial criteria for civil commitment decisions.[51]

The Court addressed the next important commitment proceeding issue in *Allen v. Illinois*.[52] In *Allen*, the Court held that the commitment proceedings "were not 'criminal' within the meaning of the Fifth Amendment to the United States Constitution."[53] The Court based its decision on statutory construction, emphasizing the fact that the language of the Illinois Act specifically stated that it was "civil in nature."[54] The Court found that "the State ha[d] disavowed any interest in punishment" and incorporated into the Act psychological treatment for the individual.[55] Moreover, the Court did not view the statute as punitive in nature because it allowed for the release of the individual at any time upon a proper showing of rehabilitation.[56] This holding had significant implications for sex offenders and further opened the door to the enactment of sexually violent predator laws.[57]

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47. *See id.* at 86–90 (O'Connor, J., concurring).
48. *Id.* at 87.
49. *Id.* at 87–88.
50. *Id.* at 88.
51. *See, e.g.*, Kansas v. Hendricks, 521 U.S. 346, 359 (1997).
52. 478 U.S. 364 (1986).
53. *Id.* at 375.
54. *Id.* at 368.
55. *Id.* at 370.
56. *Id.* at 369.
57. *See* Stephen R. McAllister, *"Punishing" Sex Offenders*, 46 KAN. L. REV. 27, 37, 39–41 (1997).

B. *Civil Commitment of Sexual Predators*

The first "sex psychopath" statutes emerged in the late 1930s and were intended to divert dangerous sex offenders from the criminal justice system to the mental health system.[58] Individuals confined under these statutes were typically held until such time as they were completely "recovered" or were no longer dangerous to society.[59] However, amid growing civil rights concerns during the 1980s, legislatures began to face questions regarding the ability of mental health professionals to accurately predict dangerousness and to provide effective treatment for sexual predators.[60] Consequently, by 1990 a number of states abolished their sexual offender commitment statutes.[61]

Concerns regarding the high recidivism rates of sex offenders did not abate, however, and many states have resuscitated these laws, recasting them as sexual predator statutes.[62] The first sexually violent predator law to emerge was the Washington Community Protection Act of 1990.[63] This Act specifically targets those offenders who committed at least one prior crime of sexual violence and were found to suffer from a "mental abnormality or personality disorder" that made them likely to commit future acts of sexual violence.[64] The Act allows prosecutors to initiate civil proceedings to provide for the confinement and treatment of these offenders for an indeterminate period of time.[65] In the first seven years following the Act's passage, approximately one percent of

58. Raquel Blacher, Comment, *A Historical Perspective of the "Sex Psychopath" Statute: From the Revolutionary Era to the Present Federal Crime Bill*, 46 MERCER L. REV. 889, 897 (1995).

59. *See id.* at 898.

60. *Id.* at 906; Brian G. Bodine, Comment, *Washington's New Violent Sexual Predator Commitment System: An Unconstitutional Law and an Unwise Policy Choice*, 14 U. PUGET SOUND L. REV. 105, 109–10 (1990); Kimberly A. Dorsett, Note, Kansas v. Hendricks: *Marking the Beginning of a Dangerous New Era in Civil Commitment*, 48 DEPAUL L. REV. 113, 115 (1998).

61. Bodine, *supra* note 60, at 110.

62. *See* Dorsett, *supra* note 60, at 115.

63. WASH. REV. CODE ANN. §§ 71.09.010–.800 (West 1992 & Supp. 2002); Lieb et al., *supra* note 14, at 44. For the complete text of the Community Protection Act, see 1990 Wash. Laws ch.3, §§ 101–1406 (codified as amended in scattered sections of WASH. REV. CODE).

64. WASH. REV. CODE ANN. § 71.09.020(12).

65. *Id.* § 71.09.030.

the sex offenders released from confinement in Washington were subsequently committed to state custody.[66]

In 1994, the Kansas Legislature followed Washington's example by passing the Sexually Violent Predator Act, modeled after the Washington Act in both content and structure.[67] The United States Supreme Court has since upheld the constitutionality of the Kansas statute in two separate cases: *Kansas v. Hendricks* and *Kansas v. Crane*.

III. THE KANSAS SEXUALLY VIOLENT PREDATOR ACT

A. *Preamble*

In its preamble, the Kansas Sexually Violent Predator Act targets "an extremely dangerous group of sexually violent predators who have a mental abnormality or personality disorder and who are likely to engage in repeat acts of sexual violence if not treated."[68] It justifies the need for this legislation by asserting that "the existing civil commitment procedures . . . are inadequate to address the special needs of sexually violent predators and the risks they present to society."[69]

B. *Procedures and Protections*

The Act allows for the process of civil commitment to begin while an individual is incarcerated.[70] It requires prison authorities to provide the state attorney general with notice of the anticipated release of a sexual offender ninety days before the individual's release date.[71] The state attorney general must then determine whether the confined individual "meets the definition of a sexually violent predator."[72] If the individual fits this profile, the attorney general may file a petition with the trial court, alleg-

66. Lieb et al., *supra* note 14, at 66.

67. *See In re* Hendricks, 912 P.2d 129, 131 (Kan. 1996). *Compare* KAN. STAT. ANN. § 59-29a04 (1994 & Supp. 2000), *with* WASH. REV. CODE § 71.09.030.

68. KAN. STAT. ANN. § 59-29a01.

69. *Id.*

70. *See id.* § 59-29a03(a)(1).

71. *Id.* § 59-29a03(a), (a)(1).

72. *Id.* § 59-29a04(a).

ing facts that support such a designation.[73] If the trial judge determines that probable cause exists that the individual meets this definition, the Act gives the state authority to retain custody of the individual.[74] The detainee is entitled to a hearing within seventy-two hours to contest this finding of probable cause,[75] at which he is guaranteed the right to counsel, to present evidence, to cross-examine adverse witnesses, and to review and copy all petitions and reports filed with the court.[76] If the court upholds the finding of probable cause, the state transfers the offender to an appropriate facility for a professional psychiatric evaluation.[77]

The court must then conduct a trial within sixty days of the probable cause hearing.[78] At this trial, the defendant is afforded specific rights, such as the rights to appointed counsel and trial by jury.[79] Further, the state has the burden of proving beyond a reasonable doubt that the defendant is a sexually violent predator within the meaning of the statute.[80] If the finder of fact determines that there is sufficient evidence, the court must commit the individual to the custody and care of the Secretary of the Department of Social and Rehabilitation Services ("the Secretary").[81]

Once an individual has been committed, the Act provides three potential methods of release.[82] First, an offender must receive an annual examination that evaluates his mental condition and status as a sexually violent predator.[83] Based on this examination, the court may determine that probable cause exists to demonstrate that the individual's condition has improved sufficiently to be safely released.[84] Upon a finding of probable cause, the court must schedule a hearing, in which the state may rebut the results of the examination with proof beyond a reasonable doubt that the person remains a sexually violent predator.[85] If the state cannot

73. *Id.*
74. *Id.* § 59-29a05(a).
75. *Id.* § 59-29a05(b).
76. *Id.* § 59-29a05(c).
77. *Id.* § 59-29a05(d). A county jail may be an "appropriate secure facility." *Id.*
78. *Id.* § 59-29a06.
79. *Id.*
80. *Id.* § 59-29a07(a).
81. *Id.*
82. *Id.* §§ 59-29a08(c), a10(b), a11.
83. *Id.* § 59-29a08(a).
84. *Id.* § 59-29a08(b).
85. *Id.*

meet this burden of proof, the individual must receive a transitional release.[86]

Under the second method, the Secretary may make the determination that the person should no longer be confined due to a change in mental condition.[87] Upon making this decision, the Secretary authorizes the confined person to petition the court for a transitional release.[88] The court receiving the petition must hold a hearing within thirty days.[89] At this hearing, the State must prove beyond a reasonable doubt that the individual remains a sexually violent predator, or must relinquish custody.[90]

Finally, the offender may initiate a third form of release at any time by filing a petition for discharge.[91] However, if the Secretary does not approve this petition, the court may deny it without a hearing.[92]

C. *The Mental Illness Standard*

In order to classify an individual as a sexually violent predator under the Act, two elements must exist: (1) the individual was charged with or convicted of a violent sexual offense; and (2) the individual "suffers from a mental abnormality or personality disorder which makes [him] likely to engage in repeat acts of sexual violence."[93] This language includes several terms of art that require further definition.

1. Mental Abnormality

The Act defines "mental abnormality" as "a congenital or acquired condition affecting the emotional or volitional capacity which predisposes the person to commit sexually violent offenses in a degree constituting such person a menace to the health and

86. *Id.* § 59-29a08(c).
87. *Id.* § 59-29a10(a).
88. *Id.*
89. *Id.*
90. *Id.* § 59-29a10(a)–(b).
91. *Id.* § 59-29a11.
92. *Id.*
93. *Id.* § 59-29a02(a).

safety of others."[94] Volitional capacity is best explained as "the capacity to exercise choice or will."[95] In contrast, the term "emotional capacity" accounts for bad behavior induced by some individual factor other than a lack of control.[96]

The definition of "mental abnormality" has generated a number of questions.[97] First, commentators have raised concerns that the term does not meet the standard of "some medical justification," as outlined in Justice O'Connor's concurring opinion in *Foucha*.[98] Since the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders ("DSM-IV")[99] does not address the term "mental abnormality," critics assert that the term is not medically recognized and therefore not sufficient to justify civil commitment.[100]

Moreover, critics question the definition of "mental abnormality" because of its circularity.[101] The Act establishes mental abnormality based on the individual's history of sexually deviant behavior.[102] The definition may therefore lack medical validity as a standard for mental illness, since "the abnormality is derived from the sexual behavior which in turn is used to establish the predisposition to other sexual behavior."[103] This circularity allows the entire justification for commitment to be based upon prior sexual misconduct, rather than a distinguishable mental infirmity.[104]

In *Hendricks*, the United States Supreme Court only superficially analyzed the term "mental abnormality" in the context of

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94. *Id.* § 59-29a02(b).

95. *In re* Crane, 7 P.3d 285, 289 (Kan. 2000).

96. *Id.*

97. *See, e.g.*, Alexander D. Brooks, *The Constitutionality and Morality of Civilly Committing Violent Sexual Predators*, 15 U. PUGET SOUND L. REV. 709, 729–30 (1992).

98. Foucha v. Louisiana, 504 U.S. 71, 88 (1992) (O'Connor, J., concurring); *cf.* Brooks, *supra* note 97, at 730.

99. AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (4th ed. 1994) [hereinafter DSM-IV].

100. *See* Dorsett, *supra* note 60, at 139–42 (summarizing criticism of the Kansas Act's use of term "mental abnormality"); *cf.* Brooks, *supra* note 105, at 730.

101. *See* Robert M. Wettstein, *A Psychiatric Perspective on Washington's Sexually Violent Predators Statute*, 15 U. PUGET SOUND L. REV. 597, 602 (1992).

102. *See* KAN. STAT. ANN. § 59-29a02(b) (1994 & Supp. 2000).

103. Wettstein, *supra* note 101, at 602.

104. John Q. La Fond, *Washington's Sexually Violent Predator Law: A Deliberate Misuse of the Therapeutic State for Social Control*, 15 U. PUGET SOUND L. REV. 655, 698–99 (1992).

the Kansas Act.[105] They found that the term was constitutionally sound because it incorporated a condition that affects the ability to control behavior.[106] The Court determined that this standard provided sufficient evidence that recidivism was likely to occur, and therefore confinement was justified in order to protect public safety.[107] Because the Court found that the term was based on reasonable legislative judgment, it applied no further scrutiny.[108] Consequently, it failed to address whether a condition affecting emotional rather than volitional capacity would be equally acceptable under constitutional standards.

2. Personality Disorder

The Kansas Act does not provide a specific definition for the term "personality disorder." The American Psychiatric Association, however, recognizes it as a distinct mental condition, describing it as "an enduring pattern of inner experience and behavior that deviates markedly from the expectations of the individual's culture."[109] To the extent that the DSM-IV definition is accepted by the medical community, it appears to meet Justice O'Connor's standard of "some medical justification."[110] Yet, the question remains as to whether this type of disorder is sufficiently pervasive to justify civil confinement.

IV. INTERPRETATION OF THE ACT IN *KANSAS V. HENDRICKS*

A. *The Act Survives Constitutional Challenge*

The Kansas Sexually Violent Predator Act was used to commit Leroy Hendricks after he served a ten-year sentence for taking indecent liberties with two young boys.[111] A psychiatrist testified at the commitment hearing that Hendricks suffered from pedophilia, a condition that qualified as a mental abnormality under

105. *See* Kansas v. Hendricks, 521 U.S. 346, 356–60 (1997).
106. *Id.* at 357–58.
107. *Id.* at 358.
108. *See id.* at 359.
109. DSM-IV, *supra* note 99, at 633.
110. Foucha v. Louisiana, 504 U.S. 71, 88 (1992) (O'Connor, J., concurring).
111. *See In re* Hendricks, 912 P.2d 129, 130 (Kan. 1996).

the Act.[112] Based in part on this testimony, the jury determined that Hendricks was a sexually violent predator, and he was committed to state custody.[113]

In his appeal to the Kansas Supreme Court, Hendricks challenged the constitutionality of the Act on various grounds.[114] Upon review, the court determined that a substantial liberty interest was at risk and therefore employed heightened scrutiny.[115] The court struck down the Act, holding that it violated Hendricks' substantive due process rights.[116] The court concluded that an antisocial personality is not sufficient to constitute mental illness or justify civil commitment.[117]

On appeal, the United States Supreme Court explicitly outlined the basic substantive due process requirements for the civil commitment laws.[118] First, the opinion noted that "freedom from physical restraint" is a fundamental liberty protected by the Due Process Clause.[119] Nevertheless, the Court cautioned that this protection is "not absolute."[120] The Court explained that states have the right to commit individuals "who are unable to control their behavior and who thereby pose a danger to the public health and safety."[121] The Court added, however, that this type of confinement must incorporate the "proper procedures and evidentiary standards" to survive constitutional scrutiny.[122]

The Court then stated that Hendricks's double jeopardy and ex post facto challenges failed since the nature of the Act is civil rather than criminal.[123] In so holding, the Court explained that it would "reject the legislature's manifest intent only where a party challenging the statute provides 'the clearest proof' that 'the statutory scheme [is] so punitive either in purpose or effect as to

112. *See id.* at 131.
113. *See id.*
114. *Id.* at 133.
115. *See id.* at 136.
116. *Id.* at 138.
117. *Id.* (citing Foucha v. Louisiana, 504 U.S. 71 (1992); Addington v. Texas, 441 U.S. 418 (1979)).
118. Kansas v. Hendricks, 521 U.S. 346, 356–60 (1997).
119. *Id.* at 356.
120. *Id.*
121. *Id.* at 357.
122. *Id.*
123. *Id.* at 361.

negate [the State's] intention' to deem it 'civil.'"[124] The Court concluded that Hendricks had not met this heightened standard.[125]

The Court also stated that requirements of dangerousness and mental illness in the Act satisfied due process.[126] The Act specifically requires a previous conviction for a sexually violent offense, and also limits confinement to those offenders who exhibit a mental abnormality or personality disorder that greatly increases the likelihood that they would commit sexually violent acts in the future.[127] The Court explained that those two requirements, when considered together, could constitute an effective predictor of future predatory violence.[128]

The Court then rejected the contention that "mental illness" was the only standard that could be used to justify civil commitment.[129] In support of this decision, the Court cited the differing standards applied in *Addington*, *Jackson*, and *Foucha* and reiterated that "'psychiatrists disagree widely and frequently on what constitutes mental illness.'"[130] Ultimately, the Court held that the Kansas Act satisfied substantive due process requirements because Hendricks's diagnosis of pedophilia fit the definition of a mental abnormality.[131]

The Court supported its decision using language that lies at the heart of the "lack-of-control" debate, stating that previous cases had upheld civil commitment statutes that "coupled proof of dangerousness with the proof of some additional factor, such as a 'mental illness' or 'mental abnormality.'"[132] This additional factor, the Court asserted, limited confinement "to those who suffer from a volitional impairment rendering them dangerous beyond their control."[133] The Kansas Act meets this requirement, the Court held, because it bases commitment on a finding of "a 'mental ab-

124. *Id.* (quoting United States v. Ward, 448 U.S. 242, 248–49 (1980)) (alterations in original).

125. *Id.*

126. *Id.* at 358–60.

127. KAN. STAT. ANN. § 59-29a02(a) (1994 & Supp. 2000).

128. *See Hendricks*, 521 U.S. at 358.

129. *See id.* at 359.

130. *Id.* (quoting Ake v. Oklahoma, 470 U.S. 68, 81 (1985)).

131. *Id.* at 361.

132. *Id.* at 358.

133. *Id.*

normality' or 'personality disorder' that makes it difficult, if not impossible, for the person to control his dangerous behavior."[134]

B. *The Impact of* Hendricks *on the "Mental Illness" Standard*

While the Court in *Hendricks* concluded that the civil commitment of sexually violent predators was constitutionally permissible under the Kansas Act, it failed to define "mental illness" with any further clarity.[135] Yet, the opinion suggests that the Kansas statute met constitutional standards because it restricted "involuntary civil confinement to those who suffer from a volitional impairment rendering them dangerous beyond their control."[136] The use of this language raised the question of whether the "volitional impairment" requirement was applicable only to the *Hendricks* case, in which the defendant admitted his inability to control his behavior,[137] or whether it constituted a new due process requirement that applied to the civil commitments of all sex offenders.[138] Consequently, the Court in *Kansas v. Crane*[139] revisited this issue in an attempt to provide a more definitive illustration of the type of offender who may fall within the purview of sexually violent predator statutes.[140]

V. THE APPROACH TO "LACK-OF-CONTROL" IN *KANSAS V. CRANE*

At Michael Crane's civil commitment hearing, the state presented evidence that Crane fulfilled both of the required elements of the sexually violent predator statute.[141] He had been convicted of aggravated sexual battery, which constituted a sexually violent offense.[142] Furthermore, state psychiatrist Leonardo Mabugat diagnosed him with antisocial personality disorder, which satisfied

134. *Id.*
135. *See id.* at 358–59.
136. *Id.* at 358.
137. *See id.* at 360.
138. *See* Brief for Respondent at 6–7, Kansas v. Crane, 122 S. Ct. 867 (2002) (No. 00-957).
139. 122 S. Ct. 867 (2002).
140. *See id.* at 870.
141. *In re* Crane, 7 P.3d 285, 293 (Kan. 2000).
142. *See id.*; KAN. STAT. ANN. § 59-29a02(e)(9) (1994 & Supp. 2000).

the mental illness component of the Act.[143] In support of this diagnosis, the jury heard testimony from three other state psychologists who diagnosed Crane with antisocial personality disorder and exhibitionism.[144] One psychologist testified that, in his opinion, this combination of disorders made Crane a sexually violent predator.[145] He predicted that Crane would become increasingly daring and aggressive, which would result in an increase in the frequency and intensity of incidents.[146] Based on this evidence, the jury found beyond a reasonable doubt that Crane fulfilled both of the required characteristics of a violent sexual predator.[147]

A. *The Application of the Standard by the Kansas Supreme Court*

Crane argued on appeal that, because a person may be diagnosed with a personality disorder without exhibiting an inability to control behavior, the use of this standard to support civil commitment was unconstitutional under *Hendricks*.[148] Because the state psychologists who testified at the hearing described Crane's behavior as "a combination of willful and uncontrollable behavior,"[149] Crane argued that the state lacked a sufficient constitutional basis to confine him as a sexually violent predator.[150]

The Kansas Supreme Court agreed with Crane's contention. In its holding, the court stated that "[a] fair reading of the majority opinion in *Hendricks* leads us to the inescapable conclusion that commitment under the Act is unconstitutional absent a finding that the defendant cannot control his dangerous behavior."[151] Furthermore, the court concluded that "Crane suffers from a 'personality disorder,' which by definition does not include a voli-

143. *Crane*, 7 P.3d at 287, 289–90.
144. *See* Brief of Petitioner at 5–6, Kansas v. Crane, 122 S. Ct. 867 (2002) (No. 00-957).
145. *Id.* at 6.
146. *See Crane*, 7 P.3d at 287.
147. *See* Brief of Petitioner at 8, *Crane* (No. 00-957).
148. *Crane*, 7 P.3d at 288, 290.
149. *Id.* at 290.
150. *Id.* at 288.
151. *Id.* at 290.

tional impairment."[152] Consequently, the court reversed and remanded his case for a new trial.[153]

Kansas petitioned the United States Supreme Court for a writ of certiorari to challenge the decision on the grounds that the Kansas Supreme Court interpreted *Hendricks* in an overly restrictive manner.[154] The United States Supreme Court addressed the issue of whether an individual who possesses a limited ability to control his behavior should fall under the purview of civil commitment laws.[155]

B. *The United States Supreme Court's Response*

The Supreme Court rejected the strict volitional control requirement adopted by the Kansas Supreme Court, and accordingly vacated the judgment and remanded the case for further proceedings.[156] The Court explained that the language used in *Hendricks*—"*difficult*, if not impossible . . . to control"—permitted the commitment of offenders who did not display a complete inability to control their behavior.[157] This conclusion was supported with the argument that "an absolutist approach is unworkable," because even those individuals who display the most severe forms of mental illness exhibit some degree of control over their behavior.[158] Furthermore, the Court explained that "[i]nsistence upon absolute lack of control would risk barring the civil commitment of highly dangerous persons suffering severe mental abnormalities."[159]

On the other hand, the Court did not imply that an inability to control behavior was irrelevant in civil commitment decisions.[160] Rather, the Court considered the presence of volitional control to be an important factor that could be used to distinguish the of-

152. *Id.*
153. *Id.*
154. Kansas v. Crane, 122 S. Ct. 867, 868 (2002).
155. *See* Brief of Petitioner at i, Kansas v. Crane, 122 S. Ct. 867 (2002) (No. 00-957).
156. *Crane*, 122 S. Ct. at 868.
157. *Id.* at 870 (quoting Kansas v. Hendricks, 521 U.S. 346, 358 (1997)) (emphasis in original).
158. *Id.*
159. *Id.*
160. *See id.*

fenders subject to civil commitment from those who were "'more properly dealt with exclusively through criminal justice proceedings.'"[161] Consequently, the Court held that a fact-finder must determine that an offender suffers from a "lack-of-control" in order to impose continued confinement.[162]

Nevertheless, the Court only vaguely articulated the appropriate standard to be applied in making these determinations.[163] The Court explained that, because volitional impairments cannot be measured with any "mathematical precision,"[164] it is important to create a standard that can be reasonably applied to a variety of circumstances.[165] The Court stated that "[i]t is enough to say that there must be proof of serious difficulty in controlling behavior . . . in light of such features of the case as the nature of the psychiatric diagnosis, and the severity of the mental abnormality itself."[166] Further decisions regarding the application of the standard were to be made "as specific circumstances require."[167]

The Court attempted to justify this vague standard by explaining that "the Constitution's safeguards . . . are not always best enforced through precise bright-line rules."[168] Rather, the Court asserted that it was best to proceed "deliberately and contextually, elaborating generally stated constitutional standards and objectives . . . ."[169] The Court believed this approach allowed the states to retain a level of autonomy in defining eligibility standards, while also providing ample flexibility for advances in the field of psychiatry.[170]

The Court then addressed the applicability of the Kansas statute to those offenders who suffered from emotional and cognitive impairments, rather than a purported lack of control.[171] In *Hendricks*, the Court had not addressed this issue because Hendricks was a pedophile who admitted his inability to control

161. *Id.* (quoting *Hendricks*, 521 U.S. at 360).
162. *See id.*
163. *See id.*
164. *Id.*
165. *See id.* at 871.
166. *Id.* at 870.
167. *Id.* at 871.
168. *Id.*
169. *Id.* at 871.
170. *See id.*
171. *See id.*

his behavior.[172] Consequently, the State specifically posed this question to the Court in *Crane*.[173]

In response, the Court pointed out that *Hendricks* had drawn no clear distinction between "'emotional'" and "'volitional'" abnormalities.[174] The Court further explained that, in previous cases, no distinction had been made between volitional, emotional, and cognitive impairments in the context of constitutional analysis, as these have been perceived as areas in which there is "'considerable overlap.'"[175] Nevertheless, the majority opinion does not provide a direct answer to the question: "The Court in *Hendricks* had no occasion to consider whether confinement based solely on 'emotional' abnormality would be constitutional, and we likewise have no occasion to do so in the present case."[176]

C. *Justice Scalia's Dissent*

Justice Scalia argued that the Court's decision in *Crane* was inconsistent with the holding in *Hendricks*.[177] He contended that the Court upheld the Kansas Sexually Violent Predator Act in its entirety in *Hendricks*, and therefore no cause existed to revisit its constitutionality.[178] He asserted that the statute as written, without a separate control requirement, already sufficiently distinguished between those offenders subject to civil commitment and those subject to criminal liability, as it required a finding of a "causal connection" between the probability of future acts of sexual violence and the present existence of a mental disorder.[179] He argued that this combination of factors already assumed the "'difficulty, if not impossibility'" in controlling behavior and that a separate requirement was unnecessary.[180]

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172. Kansas v. Hendricks, 521 U.S. 346, 360 (1997).

173. *Crane*, 122 S. Ct. at 870.

174. *Id.* at 871.

175. *Id.* (quoting Insanity Defense Work Group, *American Psychiatric Association Statement on the Insanity Defense*, 140 AM. J. PSYCHIATRY 681, 685 (1983)).

176. *Id.* at 872.

177. *See id.* (Scalia, J., dissenting).

178. *Id.* at 875.

179. *Id.* at 873–74.

180. *Id.* at 873.

Furthermore, he argued that, because the Court narrowly interpreted *Hendricks* to cover only volitional applications of the statute, it reopened the question of whether emotional and cognitive impairments were permitted to fall within the scope of the statute.[181] He denied that there was merit in the distinction between volitional and other types of impairments, noting that "[i]t is obvious that a person may be able to exercise volition and yet be unfit to turn loose upon society."[182] Nonetheless, he asserted that, in failing to uphold the statute in its entirety, the Court had left this issue open for future debate.[183]

In his concluding remarks, Justice Scalia strongly criticized the ambiguity favored by the majority in *Crane*.[184] He argued that the Court failed to provide guidance to trial courts as to how to instruct juries in future cases, and left the law in "a state of utter indeterminacy."[185]

VI. QUESTIONS THAT REMAIN AFTER *CRANE*

A. *Can Sexually Violent Predator Laws Be Applied to Offenders with Emotional and Cognitive Impairments?*

In *Hendricks* and *Crane*, the Court upheld the constitutionality of the Kansas statute as applied to offenders with a lack of control and failed to address the applicability of the statute to individuals with other mental impairments.[186] Consequently, the question remains as to whether offenders who commit premeditated, controlled acts while in a state of delusion or hallucination could be classified as sexually violent predators.[187] Justice Scalia addressed this conundrum in his dissent, stating that "[t]he man who has a will of steel, but who delusionally believes that every woman he meets is inviting crude sexual advances, is surely a dangerous sexual predator."[188] Nevertheless, if the statute applies

181. *Id.* at 874–75.
182. *Id.* at 875.
183. *See id.*
184. *See id.* at 875–77.
185. *Id.* at 876.
186. *Compare id.* at 871, *with* Kansas v. Hendricks, 521 U.S. 346, 360 (1997).
187. *Crane*, 122 S. Ct. at 875 (Scalia, J., dissenting).
188. *Id.*

strictly to individuals who display a lack of control, these individuals will fall outside of its reach.[189]

This approach has been strongly criticized.[190] Opponents contend that offenders with emotional and cognitive impairments present an equal danger to society and may be found legally insane under current laws, and thus their exclusion is unfounded.[191] Even Crane's counsel admitted that the exclusion of emotional and cognitive impairments was unjustified, conceding in his oral argument before the Court that "what the Kansas Supreme Court did was effectively cut off . . . the ability of the State to incapacitate people who have other type [sic] of significant mental disorders such as . . . the hallucinations, the psychoses. Those are a different breed of mental illnesses with different effects."[192]

Furthermore, critics argue that the distinction between these types of impairments is not meaningful because they frequently coexist in mentally ill offenders.[193] Mental health experts have observed that "considerable overlap between a psychotic person's defective understanding or appreciation and his ability to control his behavior [exists]."[194] While the Court acknowledged the impracticability of this type of distinction in *Crane*, it left the question to be addressed "'deliberately and contextually'" in future cases.[195]

B. *Is a "Lack-of-Control" Standard Workable in the Legal System?*

Critics also argue that a mental illness standard based on volitional control proves unworkable in the legal context.[196] Currently, the standard incorporates no legal construct that would

189. *See id.* at 875–76.

190. *See* Falk, *supra* note 25, at 141.

191. *See id.* at 140 (demonstrating overinclusiveness and underinclusiveness of Kansas Act).

192. Transcript of Oral Argument, Kansas v. Crane, No. 00-957, 2001 U.S. TRANS LEXIS 58, at *47 (Oct. 30, 2001).

193. *See* Insanity Defense Work Group, *American Psychiatric Association Statement on the Insanity Defense*, 140 AM. J. PSYCHIATRY 681, 685 (1983).

194. *Id.*

195. *Crane*, 122 S. Ct. at 871; *id.* at 876 (Scalia, J., dissenting).

196. *See, e.g.*, Brief for the Association for the Treatment of Sexual Abusers as Amicus Curiae in Support of Petitioner at 6, Kansas v. Crane, 122 S. Ct. 867 (2002) (No. 00-957).

enable courts to make normative determinations regarding an offender's ability to control his behavior.[197] While mental health determinations such as insanity and competency employ objective criteria such as knowing, understanding, and communicating, volitional standards provide no such foundations upon which fact-finders can base their decisions.[198] It is for this reason that "irresistible impulse" standards have previously been rejected by the legal system.[199]

Moreover, this standard generally precludes experts from reaching ultimate conclusions regarding legal issues.[200] Yet, under a lack-of-control standard, it would appear that the findings of a mental health professional would conclusively guide the ultimate decision of whether an individual could exercise his free will and control his behavior at the time of his offense.[201] The American Medical Association criticized this practice in the past, asserting that "it is impossible for psychiatrists to determine whether a mental impairment has affected the defendant's capacity for voluntary choice, or caused him to commit the particular act in question."[202] Other mental health professionals have noted that "any such inquiry would have to focus on the defendant's desires, thoughts, and feelings, which are . . . inaccessible by any currently known measuring techniques."[203] The application of this standard, therefore, could result in less than satisfactory outcomes, "because [if] the psychiatrist can't make a determination objectively, we're left with a potential predator telling us who applies—who's eligible for this law and who isn't."[204]

The Court attempted to address this issue in *Crane*, observing that "the science of psychiatry, which informs but does not control

197. *See* Falk, *supra* note 25, at 141.

198. *Id.*; *see also* Drope v. Missouri, 420 U.S. 162, 171 (1975) (discussing insanity); Robert F. Schopp & Barbara J. Sturgis, *Sexual Predators and Legal Mental Illness for Civil Commitment*, 13 BEHAV. SCI. & L. 437, 446–47 (1995) (discussing incompetence).

199. *See* Brief for the Association for the Treatment of Sexual Abusers at 4, *Crane* (No. 00-957).

200. *See* Schopp & Sturgis, *supra* note 198, at 446–47.

201. *See id.* at 446.

202. Bd. of Trs., Am. Med. Ass'n, *Insanity Defense in Criminal Trials and Limitation of Psychiatric Testimony*, 251 JAMA 2967, 2978 (1984).

203. Brief for the Association for the Treatment of Sexual Abusers at 7, *Crane* (No. 00-957).

204. Transcript of Oral Argument, Kansas v. Crane, No. 00-957, 2001 U.S. TRANS LEXIS 58, at *7 (Oct. 30, 2001).

ultimate legal determinations, is an ever-advancing science, whose distinctions do not seek precisely to mirror those of the law."[205] Nevertheless, the Court failed to specify the appropriate legal construct that could serve as a neutral benchmark for judges and juries in making this determination. Consequently, fact-finders will likely be forced to make decisions regarding the defendant's lack of control with little guidance other than the testimony of mental health professionals, who will remain the definitive voice in civil commitment decisions.

C. *Should Individuals with Antisocial Personality Disorder Fall Within the Scope of Sexually Violent Predator Laws?*

The Kansas Act as written applies not only to individuals with a "mental abnormality," but also to those who suffer from a "personality disorder."[206] This inclusion of personality disorders significantly expands the scope of the law to include a wide variety of individuals with a broad range of mental impairment.[207] This effect has been staunchly criticized by opponents who feel that it opens the door for the civil commitment of individuals deemed "mentally ill" merely because of their penchant for criminal activity.[208] Specifically, opponents challenge the application of these laws to individuals diagnosed with "antisocial personality disorder," charging that this disorder is constitutionally insufficient to justify civil commitment.[209]

Antisocial personality disorder is described by the DSM-IV as "a pervasive pattern of disregard for, and violation of, the rights of others that begins in childhood or early adolescence and continues into adulthood."[210] An individual who receives this diagnosis must demonstrate the following characteristics: (1) the individual must be at least eighteen years old;[211] (2) there must be evidence of a conduct disorder, which includes aggression toward people and animals, destruction of property, deceitfulness or

205. Kansas v. Crane, 122 S. Ct. 867, 871 (2002).

206. KAN. STAT. ANN. § 59-29a02(a) (1994 & Supp. 2000).

207. *See In re* Crane, 7 P.3d 285, 289–90 (Kan. 2000).

208. *See, e.g., In re* Hendricks, 912 P.2d 129, 139–40 (Kan. 1996) (Lockett, J., concurring).

209. *See id.* at 140.

210. DSM-IV, *supra* note 99, at 645.

211. *Id.* at 650.

theft, or serious violations of rules;[212] and (3) there must be a pervasive pattern of disregard for and violation of the rights of others occurring since age 15 years, as indicated by three (or more) of the following: failure to conform to laws or social norms, deceitfulness, impulsivity, irresponsibility, irritability and aggressiveness, reckless disregard for safety and an absence of remorse.[213] This diagnosis does not, however, take account of antisocial behavior occurring during schizophrenic or manic episodes.[214]

Many civil commitment statutes have specifically excluded antisocial personality disorder as a basis for confinement.[215] This exclusion stems from estimations that as many as seventy-five percent of prison inmates suffer from this disorder.[216] Furthermore, the American Psychiatric Association asserts that "the presence of 'antisocial personality disorder' as the condition causing the danger provides no meaningful limiting principle" for civil commitment statutes.[217]

Conversely, supporters argue that antisocial personality disorder is not a sufficiently common diagnosis among the American population to justify exclusion.[218] DSM-IV statistics support this proposition, indicating that only three percent of males and one percent of females in the general population suffer from the disorder.[219]

The inclusion of antisocial personality disorder is further supported by the fact that, under its current definition, it sufficiently meets the *Hendricks* standard because "it narrows the class of persons eligible for confinement to those who are unable to control their dangerousness."[220] The DSM-IV distinguishes antisocial personality disorder from general criminal behavior, stating that

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212. *Id.* at 90, 650.

213. *Id.* at 649–50.

214. *Id.* at 650.

215. *See, e.g.*, ARIZ. REV. STAT. ANN. § 36-501(22) (West 1993) (defining mental disorder within general civil commitment statute to exclude "personality disorders characterized by . . . antisocial behavior patterns").

216. *In re* Crane, 7 P.3d 285, 290 (Kan. 2000).

217. Brief for the American Psychiatric Association and American Academy of Psychiatry and the Law as Amici Curiae in Support of Respondent at 18, Kansas v. Crane, 122 S. Ct. 867 (2002) (No. 00-957) (citation omitted).

218. *See* Brief of Petitioner at 22, *Crane* (No. 00-957).

219. DSM-IV, *supra* note 99, at 648.

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

"[o]nly when antisocial personality traits are inflexible, maladaptive, and persistent and cause significant functional impairment or subjective distress do they constitute Antisocial Personality Disorder."[221] Under these guidelines, an individual cannot be confined merely because he committed a criminal act and has exhibited "an antisocial personality that sometimes leads to aggressive conduct."[222] For that reason, these statutes appear to create the necessary framework to abate the Court's concern regarding statutory misuse, and the inclusion of these types of offenders should be constitutionally permissible.

VII. FUTURE DIRECTION OF SEXUALLY VIOLENT PREDATOR LAWS

The difficulties with the "lack-of-control" standard make its utility in the legal system problematic. Consequently, the Court in future cases should consider constructing a new standard that incorporates elements that are more easily applicable in the legal context.

A. *Present Dangerousness*

The prediction of future dangerousness that is currently used to justify civil commitment requires mental health professionals to perform beyond the scope of their expertise.[223] The American Psychiatric Association states that any "psychiatric prediction that someone like Crane presents a near-term threat of serious harm is inherently uncertain."[224] Accordingly, the Court should revise the standard to require only an assessment of present dangerousness, focusing the courts' examination on "the current risk posed by the individual."[225]

221. DSM-IV, *supra* note 99, at 649.

222. Foucha v. Louisiana, 504 U.S. 71, 82 (1992).

223. Falk, *supra* note 25, at 141.

224. Brief of the American Psychiatric Association and American Academy of Psychiatry and the Law as Amici Curiae in Support of Respondent at 17, Kansas v. Crane, 122 S. Ct. 867 (2002) (No. 00-957).

225. Falk, *supra* note 25, at 145–46.

B. *Criminal Irresponsibility*

Prior case law historically equated mental illness with lack of criminal responsibility, under the rationale that dangerous persons who are able to control their behavior are "more properly dealt with exclusively through criminal proceedings."[226] Furthermore, critics of sexually violent predator laws have asserted that

> [t]o allow the state to first choose the criminal sanction, which requires a finding of a specific state of mind, and when that sanction is completed, to choose another sanction which requires a finding of the opposite state of mind, is a mockery of justice which places both the criminal and civil systems for dealing with sexual predators in disrepute.[227]

For this reason, it would appear more legally sound to limit the application of sexually violent predator statutes to "those dangerous persons who cannot be incarcerated within the criminal justice system."[228]

Accordingly, legislatures should pursue extended criminal sentences for sex offenders, especially recidivists, and should allow for indeterminate sentencing as a judicial option.[229] Under this framework, the state gives to the parole boards, rather than the mental health system, the responsibility for determining whether a sex offender has been rehabilitated and is safe for release.[230] This would help untangle the complicated relationship that currently exists between civil commitment and criminal processes, which has had the effect of "[t]urning doctors into jailers . . ., undermining the therapeutic alliance with their patients that is basic to medicine generally and psychiatry in particular."[231]

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226. Kansas v. Hendricks, 521 U.S. 346, 360 (1997).

227. *In re* Linehan, 518 N.W.2d 609, 616 (Minn. 1994) (Gardebring, J., dissenting).

228. Falk, *supra* note 25, at 145.

229. *See id.* at 146. For example, the Colorado Sex Offenders Act currently provides for indeterminate sentencing that allows for a sex offender to remain in custody "a minimum of one day and a maximum of his natural life." COLO. REV. STAT. § 16-13-203 (2001).

230. *See* Falk, *supra* note 25, at 147. Under the Colorado law, within six months after confinement and annually thereafter, the parole board must review "all reports, records, and information" related to the offender's confinement to determine whether the person should be paroled. COLO. REV. STAT. § 16-13-202(1), -216 (2001).

231. Brief of the American Psychiatric Association and American Academy of Psychiatry and the Law as Amici Curiae in Support of Respondent at 22, Kansas v. Crane, 122 S. Ct. 867 (2002) (No. 00-957).

C. *Mental Health Specialty Courts*

States should also consider the establishment of additional mental health specialty courts.[232] These judicial forums have sprung up across the United States in recent years in an attempt to address the growing population of mentally ill offenders housed within the jails and prisons.[233] The goal of mental health courts is to prevent the "revolving door" phenomenon that often occurs for mentally ill defendants by focusing on treatment efforts while "minimizing the detrimental effects of the law."[234]

The duties of mental health specialty courts may include committing individuals who were deemed incompetent to stand trial in criminal proceedings, monitoring patients on conditional release, and dealing with individuals who were found to be dangerous or physically or mentally ill.[235] The proceedings in these courts are typically nonadversarial, with the judge involving not only the prosecution and defense, but also correctional facilities, law enforcement personnel, and health care providers, in determining appropriate outcomes.[236]

These specialty courts may serve as a more impartial and effective forum for sexually violent predators. The judges and lawyers who participate have more expertise in the area of mental illness, and can more readily distinguish between those offenders who require treatment and those for whom punishment is more appropriate.[237] Furthermore, judges with specialized knowledge in mental illness may provide more effective monitoring of sex offenders, possibly allowing for the utilization of less restrictive alternatives, thereby reducing the frequency of civil commitment.[238]

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232. For a detailed discussion of the use of mental health specialty courts, see generally LeRoy L. Kondo, *Advocacy of the Establishment of Mental Health Specialty Courts in the Provision of Therapeutic Justice for Mentally Ill Offenders*, 24 SEATTLE U. L. REV. 373 (2000).

233. *See id.* at 373.

234. *Id.* at 374, 381.

235. *See id.* at 410 (describing general duties of mental health specialty courts).

236. *Id.* at 411.

237. *See id.* at 412, 415–16.

238. *Id.* at 407, 421.

VIII. CONCLUSION

Between active psychosis and complete psychological stability exists a wide range of mental conditions.[239] These circumstances create a dilemma for the courts, which are left with the responsibility of determining a point beyond which a person should be confined based on their level of mental illness. While the Court intended to use *Kansas v. Crane* to illuminate this standard in relation to sexually violent predator laws, it failed to provide a clear, workable framework for mental illness determinations.[240] Consequently, it is likely that the Court will again face questions regarding the permissible scope of sexually violent predator statutes.

Because a lack-of-control standard appears to create significant difficulties in the legal context, the Court should reconsider its policy of "proceeding deliberately and contextually," and develop an appropriate measure for mental illness.[241] A concrete, viable standard that is not overly reliant on mental health professionals and that provides states with guidelines effectively targeting the most dangerous within this group of offenders is necessary to effectively provide for the public safety.

Nevertheless, the Court in *Crane* made it clear that such a standard is not forthcoming. This reluctance was explained during oral arguments in *Crane*, as one of the justices explicitly admitted that, "[w]e're not psychiatrists or psychologists either. That's . . . part of the problem . . . in our setting as precise a benchmark as you would like us to set."[242] Consequently, the Court is likely to continue to avoid venturing into the mysteries of the mind, leaving mental illness to remain a vague concept in courtrooms and legislatures for years to come.

Georgia Smith Hamilton

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239. *See* Brief of Petitioner at 11, Kansas v. Crane, 122 S. Ct. 867 (2002) (No. 00-957).

240. *See* discussion *supra* Parts V.C, VI.

241. Kansas v. Crane, 122 S. Ct. 867, 871 (2002).

242. Transcript of Oral Argument, Kansas v. Crane, No. 00-957, 2001 U.S. TRANS LEXIS 58, at *46 (Oct. 30, 2001).