

***KANSAS V. HENDRICKS, CRANE AND BEYOND: “MENTAL
ABNORMALITY,” AND “SEXUAL DANGEROUSNESS”:
VOLITIONAL VS. EMOTIONAL ABNORMALITY AND
THE DEBATE BETWEEN COMMUNITY SAFETY AND
CIVIL LIBERTIES***

John M. Fabian[†]

I. INTRODUCTION	1368
II. HISTORY OF CIVIL COMMITMENT LAWS USED TO RESTRAIN VIOLENT SEXUAL PREDATORS.....	1372
A. <i>History of Involuntary Commitment</i>	1372
B. <i>State Laws and Rationale</i>	1373
C. <i>Defining Mental Illness</i>	1377
III. KANSAS SUPREME COURT DECISION	1379
IV. U.S. SUPREME COURT’S MAJORITY OPINION OF <i>KANSAS V. HENDRICKS</i> : THE COURT ADDRESSES “MENTAL ABNORMALITY”	1382
V. THE DISSENT OF <i>KANSAS V. HENDRICKS</i>	1392
VI. NEW JUDICIAL DEVELOPMENTS: <i>SELING V. YOUNG</i>	1397
VII. UNITED STATES SUPREME COURT’S MAJORITY OPINION: <i>KANSAS V. CRANE</i> : THE COURT ADDRESSES “EMOTIONAL ABNORMALITY”	1399

[†] John Fabian, M.A., Psy.D., is a forensic psychologist practicing in Ohio. He received his master’s degree in psychology at University of Cincinnati, master’s and doctoral degrees in clinical psychology at Chicago School of Professional Psychology, and is currently a fourth year law student at Cleveland-Marshall College of Law, with an anticipated graduation date of May, 2003. He is the Lake County Common Pleas and Adult Probation Department Court Psychologist and is a consultant with various courts, public defenders’ offices and court psychiatric clinics in northeast Ohio. He conducts court ordered psychological evaluations including: Sexual Predator, Not Guilty By Reason of Insanity, Competency to Stand Trial, and Mitigation Evaluations. In addition, he has a private forensic psychology practice and focuses on the above evaluations as well as death penalty mitigation in the State of Ohio. Special thanks to Margaret Campbell, Assistant Public Defender in Lake County, Ohio, who played an integral role in revisions and assisted in researching new case law; Professor Barbara Tyler, legal writing professor at Cleveland-Marshall College of Law, for helpful comments and revisions; and Dennis Doren, clinical/forensic psychologist who provided valuable information and analyses pertaining to psycho-legal issues of sex offender civil commitment law.

VIII. A SAMPLING OF PERTINENT STATE SUPREME COURTS' APPROACHES TO CIVIL COMMITMENT AND SEXUAL PREDATOR STATUTES.....	1405
IX. DEBATE BETWEEN COMMUNITY SAFETY AND CIVIL LIBERTIES	1414
X. RECOMMENDATIONS.....	1418
XI. CONCLUSION.....	1420
A. <i>Sex Offender Research: Recidivism and Treatment</i>	1426
B. <i>The Role of the Forensic/Clinical Psychologist as Expert Witness in Civil Commitment of Sexual Violent Predator Cases</i>	1433
C. <i>Ohio's Sexual Violent Predator Specification on Indictment: A State's Criminal Alternative to Civil Commitment</i>	1441

I. INTRODUCTION

The vicious and brutal rape and murder of Megan Kanka drew national attention to child sexual abuse and concerns on how to prevent such tragedies from happening in the future.¹ Soon after, national attention focused on this case, as well as the term “sexual predator,” and various pieces of legislation were considered to prevent further similar occurrences.² More specifically, issues of sexual predator registration, community notification and sexual predator civil commitment laws came to be topics of discussion.

Statutes in some states describe a “violent sexual predator” as someone who is eligible for civil commitment. The definition applies to a person who has committed a crime of sexual violence, who suffers from a mental abnormality or personality disorder that makes the person likely to engage in predatory acts of sexual violence, and who is a stranger to the victim or cultivated the relationship for the primary purpose of victimization.³ A violent sexual

1. G. Scott Rafshoon, Comment, *Community Notification of Sex Offenders: Issues of Punishment, Privacy and Due Process*, 44 EMORY L.J. 1633, 1633-34 (1995). The author discusses community notification of sex offenders regarding registration and community notification. It is possible to distinguish community notification from similar sanctions, such as sex offender registration and certain probation conditions that have typically not been classified as punishment. When viewed as a penal sanction, community notification must comply with the same constitutional requirements as other forms of punishment.

2. *Id.* at 1634.

3. Roxanne Lieb et al., *Sexual Predators and Social Policy*, 23 CRIME & JUST. 43,

predator is an individual with such a high risk for future sexual violence that he or she needs to be committed to a facility for treatment until professionals consider him rehabilitated and less of a risk to sexually re-offend. After being conditionally released from a civil commitment institution for sex offenders, the individual would be required to register with the community as a sexually violent predator for community notification purposes. In a state with a civil commitment sex offender law, only a fraction of sex offenders—the high-risk offenders, often called the “worst of the worst”—would qualify for commitment.

The term “sexual predator” may have different meanings based on different statutes, but most definitions require a sexually dangerous individual who the court deems is likely to be a risk for sexual re-offending in the future. The term, usually applied to offenders who offend against strangers, have multiple victims, have prior sexual offenses, are sexually deviant and suffer from paraphilias such as pedophilia, commit violent offenses, and may have exhibited other antisocial and criminal behaviors. Offenders whose only victims are their own children, stepchildren, or intimate partners are usually not labeled sexual predators, even if the crimes are violent.

Individuals who are sexually deviant pose a higher risk. Contrary to public belief, not all sex offenders qualify for sexually deviant psychiatric disorders. If one is labeled a sexual predator, he or she would be a high risk for sexual recidivism and as a result, would be mandated to be registered in the community as a sexual predator for community notification and safety purposes. Factors indicating a high risk of sexual offending are stranger victims, male victims, multiple victims, young victims, multiple sex offense convictions, prior sex offender treatment failure, psychopathy and antisocial personality disorder, prior violent offenses, single marital status, diverse sexual crimes, and sexual deviancy such as pedophilia.

In Megan’s case, her alleged killer had been convicted twice of sex offenses against young children.⁴ Although he had a significant sex offending background, once paroled, he lived with two other

43-44 (1998). The authors discuss the label “sexual predator” as being applied to offenders who target strangers, have multiple victims, or commit especially violent offenses.

4. Rafshoon, *supra* note 1, at 1633.

sex offenders across the street from Megan and her family.⁵ Megan's rape and murder outraged the community and politicians, causing a public outcry.⁶ Within three months of the murder, both houses in the New Jersey legislature passed legislation and the State's Republican governor signed ten bills aimed at sex offenders.⁷

While community notification and the registration of sex offenders are two significant pieces of sex offender legislation, this note will focus on the legislation regarding civil commitment of violent sexual predators. This author will argue that states should have the autonomy to initiate legislation requiring civil commitment of violent sexual predators. The states should also focus on the following: 1) imposing harsher sentencing guidelines; 2) substituting consecutive criminal sentencing guidelines rather than concurrent sentencing guidelines; and 3) developing comprehensive sex offender treatment programs.⁸

States should be granted the authority to enact civil commitment statutes to control violent sexual predators. This authority should be a state right and should be excluded from the federal domain. However, the states should consider initiating sex offender treatment while the defendant is in prison as part of his attempted rehabilitation. Furthermore, the states should impose harsher sentences and consecutive, rather than concurrent, sentences in some situations for serious sex offenders who have committed sexually violent acts. These steps may eliminate the need for the civil commitment of sex offenders and conserve state resources. Finally, when assessing violent sex offenders for civil

5. *Id.*

6. *Id.*

7. *Id.* The author indicates that community notification laws do more than make information on convicted sex offenders available to the public. They give police a "green light" to publicize information about where the offender lives in the community and information about his criminal history. Community notification laws actively disseminate the information. For example, certain states, like Louisiana, require registration at the time of parole. The State requires offenders convicted of sex offenses against victims under age eighteen to send personal information including their name, addresses, and crime(s) committed to the local school superintendent and to individuals who live within a one-mile radius in a rural area and a three square-block radius in a suburban or urban area. Convicted offenders must also publish a notice in the local newspaper. Courts are permitted to order sex offenders to provide neighbors with notice through various forms including signs, hand bills, bumper stickers, or the wearing of descriptive clothing. *Id.* at 1642.

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

commitment purposes, there should be no significant distinguishing between volitionally impaired and emotional or personality impaired offenders if they both pose a high risk for future sex offending.⁹

First, this paper will discuss the history of civil commitment laws of violent sexual predators and how they have been and are implemented. Emphasis will be placed on specific state laws and their rationale. Definitions of mental illness pertaining to these laws will be discussed. Second, the paper focuses on a detailed analysis of the Kansas Supreme Court decision, *In re Hendricks*,¹⁰ followed by an analysis of the United States Supreme Court majority and dissenting opinions in *Kansas v. Hendricks*.¹¹

Third, the note analyzes the implications of *Kansas v. Hendricks*, and *Kansas v. Crane*¹²—two prominent cases regarding the civil commitment of violent sexual predators on which the United States Supreme Court has ruled. Specifically, the issues of sexual dangerousness, and mental disorders, including volitional abnormality versus emotional abnormality, will be addressed. Implications of the role of the expert witness, especially in distinguishing between volitional and emotional abnormality and their implication in sexual dangerousness, will also be addressed.

Fourth, the note concentrates on new developments in legislation and the ongoing debate between community safety and civil liberties. The sex offender law of Ohio will be briefly addressed. Specifically, Ohio's choice to avoid the civil commitment issue by implementing a violent sexual predator indictment scheme that allows a judge to sentence a violent sex offender for up to life for his offense(s) will be discussed and contrasted to civil commitment schemes. Finally, the author will offer a summary, including a brief synopsis of the current sex offender research focusing on sex of-

9. An example of an emotionally impaired sex offender would be an individual with antisocial personality disorder. That is, someone who has the capacity to choose not to commit a sexual act, but does so, partially due to emotional and personality issues. An example of a volitionally impaired offender would be a pedophile—someone who, due to a sexual disorder, has a compulsion and volitional impairment and is unable to refrain from committing sex acts. Many of the individuals residing in civil commitment institutions for sex offenders are a “hybrid,” suffering from antisocial personality disorder or psychopathy *and* a paraphilia (sexual deviancy) making them extraordinary risks for future sexual violence.

10. 912 P.2d 129 (Kan. 1996).

11. 521 U.S. 346 (1997).

12. 534 U.S. 407 (2002).

fender assessment, recidivism, treatment efficacy, and recommendations.

II. HISTORY OF CIVIL COMMITMENT LAWS USED TO RESTRAIN VIOLENT SEXUAL PREDATORS

A. *History of Involuntary Commitment*

The involuntary commitment of sexual predators has its roots in the 1930s when state legislatures first introduced procedures for confinement of "sexual psychopaths, sexually dangerous persons, and sex offenders."¹³ The State of Michigan was the first state to pass such legislation in 1937. These statutes varied in nature and in jurisdictional basis. Some required prior criminal convictions for sex offenses.¹⁴ Many laws required different evidence of mental illness, personality disorders, and propensity to sexually re-offend. Virtually all statutes provided for involuntary civil commitment until the offender was deemed no longer a danger or threat to society.¹⁵

Many of the states labeled these statutes as Mentally Disordered Sex Offender (MDSO) statutes.¹⁶ Sex offender treatment was emphasized for these offenders because it was believed that this population was likely to have high rates of recidivism and would be amenable to treatment.¹⁷ Further, some groups of sex offenders, such as pedophiles, were likely to be ostracized by non-sex offenders and would need segregation within a prison setting.¹⁸ Commitment as a MDSO usually required that the defendant be likely to commit sex offenses as a result of a "mental disease or defect."

Many of the states' original MDSO statutes were construed so that commitment could be of an indefinite duration.¹⁹ Release from the institution could only be initiated by the superintendent of the facility and approval by the committing court. Many later statutes limited the time of confinement to be the maximum time

13. John Kip Cornwell, Article, *Protection and Treatment: The Permissible Civil Detention of Sexual Predators*, 53 WASH. & LEE L. REV. 1293, 1296 (1996) (internal quotations and citation omitted).

14. *Id.*

15. *Id.*

16. RALPH REISNER ET AL., LAW AND THE MENTAL HEALTH SYSTEM CIVIL AND CRIMINAL ASPECTS 617 (1999).

17. *Id.*

18. *Id.*

19. *Id.*

the defendant could have been sentenced to prison if convicted criminally.

More than half of the states had implemented sexual predator legislation by 1960; however, by the end of the 1980s this number had been cut in half due to concerns regarding the violation of constitutional rights and the questionable efficacy and success of sex offender treatment.²⁰ Because of the increase in commitment of sexual predators and high publicity sex offending cases, the 1990s witnessed a resurgence of legislative activity.²¹ Many states implemented statutes authorizing civil commitment of sexually violent sex offenders.²² Other states are currently considering implementing civil commitment laws for sex offenders taking into account the goals of treatment and incapacitation of the defendant without resorting to punishment or imprisonment.

B. State Laws and Rationale

The Washington Sexually Violent Predator Law was the first sexual predator law passed in the United States.²³ It was passed in 1990 and provided the State with procedures for releasing residents after civilly committed sex offender treatment, such as conditional release programs or release into the community with no supervision at all.²⁴ The Supreme Court of Washington concluded that the sexual predator provisions of the Washington Sexually Violent Predator Law were constitutional and did not violate the Ex Post Facto Clause or the prohibition against Double Jeopardy.²⁵

20. Cornwell, *supra* note 13, at 1297.

21. *Id.* at 1298.

22. States authorizing involuntary commitment for sex offenders include: Arizona, California, Florida, Illinois, Iowa, Kansas, Minnesota, Missouri, New Jersey, North Dakota, South Carolina, Tennessee, Washington and Wisconsin. States requiring treatment while sex offenders are serving prison sentences include: Colorado, Connecticut, Hawaii, Massachusetts, Montana, Nebraska, Oregon, Tennessee and Utah. States requiring treatment during probation or parole include: Colorado, Indiana, Maine and Ohio. Nevada is the only state that requires lifetime supervision after probation or parole. States requiring treatment as a condition of probation or parole include: Connecticut, Louisiana, West Virginia and Oregon. John W. Parry, *Highlights & Trends*, 23 MENTAL & PHYSICAL DISABILITY LAW REP. 137, 142 (Mar./Apr. 1999).

23. John Q. LaFond, *Symposium, Therapeutic Jurisprudence: Can Therapeutic Jurisprudence be Normatively Neutral? Sexual Predator Laws: Their Impact on Participants and Policy*, 41 ARIZ. L. REV. 375, 379 (1999).

24. *Id.* at 379-80.

25. *Id.* at 386. The State of Washington initiated legislation after defendant, Earl Shriner, had kidnapped and raped two teenage females, and when paroled,

The landmark case discussing the civil commitment of sexual predators is *Kansas v. Hendricks*.²⁶ Leroy Hendricks had a long and extensive history of diverse criminal sexual offenses.²⁷ In 1955, he pled guilty to indecent exposure after exposing his genitals to two young girls.²⁸ Two years later, he served a jail sentence after conviction for a lewdness crime against a young female victim.²⁹ In 1960, he molested two young boys and then served two years in prison, and while on parole for that offense he molested a seven-year-old girl.³⁰ He was released from a state hospital in 1965 after sex offender treatment.³¹ By 1967, he was again in prison after sexually assaulting a boy and a girl.³² He refused to participate in sex offender treatment at that time and remained incarcerated until his parole in 1972.³³ Subsequently, he entered and quit a sex offender treatment program.³⁴ When in the community, his sexual thirst and desires for children continued leading him to sexually abuse his step-children.³⁵ He was then convicted of taking indecent liberties with two thirteen-year-old boys in 1984.³⁶

Hendricks was scheduled for release from prison after serving ten years of his sentence, but, prior to his release, Kansas invoked its newly established "Mentally Abnormal Sexual Predator Statute."³⁷ This statute allowed for the civil commitment of distinct groups of serious sexual predators who were previously convicted of a sexually violent offense and completed a prison term for the crime(s).³⁸ Hendricks communicated to mental health evaluators

raped and brutally assaulted a seven-year-old boy. *See id.* at 382 & n.52.

26. *Kansas v. Hendricks*, 521 U.S. 346 (1997); *In re Hendricks*, 912 P.2d 129 (state level case).

27. Stephen J. Morse, *Fear of Danger, Flight From Culpability*, 4 PSYCHOL. PUB. POL'Y & L. 250, 252 (1998). The author "considers whether [two] recent U.S. Supreme Court cases, *Egelhoff v. Montana* and *Kansas v. Hendricks*, signal increasing social and constitutional acceptance of pure preventive detention of dangerous people. *Hendricks'* implication is that virtually any convicted criminal may be found mentally abnormal and confined civilly at the end of a prison term." *Id.* at 250.

28. *Id.* at 252.

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.*; *see* KAN. STAT. ANN. § 59-2901 (1994).

38. *See* Morse, *supra* note 27, at 252.

that when he was stressed out, he could not control his urge to molest children, and he guaranteed that the only way he would never molest children was upon his death.³⁹

Hendricks challenged the constitutionality of the Mentally Abnormal Sexual Predator Statute.⁴⁰ He claimed that although the statute protected society, it violated his Due Process rights.⁴¹ He argued that his commitment was not civil in nature, was a form of punishment and also violated the prohibitions on Double Jeopardy and Ex Post Facto laws.⁴²

Before *Hendricks*, the legal system maintained a delineation between criminal and civil confinement.⁴³ Criminal confinement was justified for defendants that were not seriously mentally ill, but were both culpable and responsible. Civil confinement was justified for individuals who were severely mentally ill and who were deemed not responsible or culpable.⁴⁴ Civil commitment always balanced the issues of liberty of the defendant, safety of the community, and dignity.⁴⁵

The United States Supreme Court, in *Foucha v. Louisiana*,⁴⁶ held that a state is required by the Due Process Clause to prove that there is convincing evidence of two statutory preconditions in or-

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.* at 256. See also Stephen J. Morse, *Blame and Danger: An Essay on Preventative Detention*, 76 BOSTON U. L. REV. 113, 116-22 (1996); Paul H. Robinson, *The Criminal-Civil Distinction and the Utility of Desert*, 76 BOSTON U. L. REV. 201, 203 (1996); Stephen J. Schulhofer, *Two Systems of Social Protection: Comments on the Civil-Criminal Distinction, With Particular Reference to Sexually Violent Predator Laws*, 7 J. CONTEMP. LEGAL ISSUES 69, 78-80 (1996).

44. Morse, *supra* note 27, at 256.

45. *Id.*

46. 504 U.S. 71, 74 (1992). The petitioner was acquitted of criminal charges by reason of insanity and committed to a mental institution for an indefinite period of time. *Id.* After several years, it was recommended that the petitioner be discharged or released. *Id.* A release panel determined that the defendant was no longer mentally ill. *Id.* The trial court appointed a sanity commission that was unable to determine whether the petitioner would be a danger to society. *Id.* The trial court denied the petitioner's release and the district court and the State supreme court affirmed. *Id.* at 75. On appeal, the U.S. Supreme Court reversed and remanded, reasoning that the petitioner's rights under the Due Process Clause of the U.S. Constitution Fourteenth Amendment were violated. *Id.* The Court reasoned the petitioner could only be detained as long as he was mentally ill or posed a danger to society. *Id.* The Court held the prosecution failed to establish by clear and convincing evidence that the petitioner was a danger to society and, therefore, he was entitled to release. *Id.*

der to commit a defendant to a mental hospital in a civil proceeding: 1) the person sought to be committed is mentally ill; and 2) the person requires hospitalization for his or her own safety and for the protection of others.⁴⁷ The *Foucha* Court held that continuing to involuntarily commit an insanity acquittee who was no longer suffering from a mental disorder violates the defendant's Due Process rights even if he cannot prove that he is no longer a danger to himself or others.⁴⁸ The State cannot civilly commit a responsible person on dangerousness alone, even if he committed dangerous behaviors in the past and continues to pose a dangerous risk to society when released.⁴⁹ The involuntary confinement could only continue until the person regained his sanity or no longer presented a danger to himself or to others.⁵⁰

Once *Foucha* regained his sanity, he could no longer be deemed insane or be confined.⁵¹ The United States Supreme Court concluded that *Foucha* could not be confined in a mental facility by the fact that he was dangerous due to his antisocial personality disorder.⁵² The Court reasoned that though *Foucha* committed a prior criminal act and has antisocial personality disorder that at times leads to criminal offending, he could not be held indefinitely against his will.⁵³ This reasoning would permit the State

47. Anne C. Gillespie, Note, *Constitutional Challenges to Civil Commitment Laws: An Uphill Battle for Sexual Predators After Kansas v. Hendricks*, 47 CATH. U. L. REV. 1145, 1148 (1998). The Supreme Court developed a two-pronged test to determine whether a statute was more preventative or punitive. *Id.* at 1153. The first prong involved the Court examining whether the legislature intended to create a civil rather than a criminal law. *Id.* The second prong evaluated the statute in light of seven factors traditionally used to determine the law's punitive effect. *Id.* See also *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963).

48. See Gillespie, *supra* note 47, at 1148.

49. See Morse, *supra* note 27, at 252.

50. *Foucha v. Louisiana*, 504 U.S. 71, 77-78 (1992).

51. *Id.*

52. *Id.*

53. *Id.* Under Louisiana law, a criminal defendant found not guilty by reason of insanity may be committed to a psychiatric hospital. *Id.* at 80. If a hospital review committee recommends that the acquittee be released, the trial court must hold a hearing to determine whether he is a danger to himself or others. *Id.* at 81. Regardless of whether he is found mentally ill, if there is a finding of dangerousness, he may be returned to the hospital. *Id.* The State court ordered *Foucha*, an insanity acquittee, to return to a mental institution where he was committed, ruling that he was dangerous on the basis of, *inter alia*, a mental health expert's testimony that he had recovered from drug induced psychosis, from which he suffered at the time of commitment. *Id.* at 82. Testimony indicated that *Foucha* was "in good shape" mentally; but he had antisocial personality disorder. *Id.* This condition is not a mental disease and is not treatable. *Id.* *Foucha* had been involved in

to indefinitely hold any other person whose personality disorder led to criminal conduct.⁵⁴ Therefore, any criminal defendant could be held indefinitely even after completing a prison term.⁵⁵

C. Defining Mental Illness

A major issue in the civil commitment legislation of sexual predators is the definition of mental illness. Historically, courts have civilly committed individuals who were dangerous to themselves or others, or could not take care of themselves. These individuals could be civilly probated or “pink slipped.”⁵⁶ Other individuals with mental illness and who have committed crimes, but cannot understand the charges or proceedings against them or are unable to assist in their defense, have been found not competent to stand trial and have been civilly committed to a mental hospital for competency restoration.⁵⁷ Finally, individuals who have had a mental illness that prohibited them from being able to appreciate right from wrong at the time of the crime or prevented them from conforming to the standards of law, have qualified for acquittal by Not Guilty by Reason of Insanity, and were civilly committed into a mental health facility.⁵⁸

various altercations and as a result of his repetitive antisocial conduct, the doctor did not “feel comfortable in certifying that he would not be a danger to himself or to other people.” *Id.* The State court of appeals refused supervisor writs. *Id.* at 71. The State supreme court affirmed, holding, among other things, that *Jones v. United States*, 463 U.S. 354 (1983) did not require Foucha’s release and the Due Process Clause of the Fourteenth Amendment was not violated by the statutory provision allowing for confinement of an insanity acquittee based only on dangerousness. *Id.*

54. *Foucha*, 504 U.S. at 82-83.

55. *Id.*

56. See Stephen Morse, Note, *Civil Commitment of Mentally Ill: Developments in the Law*, 87 HARV. L. REV. 1190, 1230 (1974); Stephen Morse, *A Preference for Liberty: The Case Against Involuntary Commitment of the Mentally Disabled*, 70 CAL. L. REV. 54, 59-65 (1982).

57. See *Jackson v. Indiana*, 406 U.S. 715, 720 (1972). The Court held that the State of Indiana could not civilly commit the defendant for an indefinite period of time based on his incompetency to stand trial on the charges filed against him. *Id.* He could not be held more than a reasonable amount of time necessary to determine whether there was a substantial probability that he would be restored to competency. *Id.* at 737. The Court reasoned that the nature and duration of commitment bear some reasonable relation to the purpose that they were committed in the first place. *Id.*

58. See *Jones v. United States*, 463 U.S. 354, 356 (1983). The Court held that an individual who was found not guilty by reason of insanity and civilly committed could not be hospitalized for a longer period of time than the longest prison sentence he could have received if he was found criminally responsible. *Id.*

However, in *Hendricks*, the issues of dangerousness, mental illness, and civil commitment concerning a sex offender were different than with an insanity acquittee. In *Hendricks*, the Kansas Supreme Court held that the Kansas Sexually Violent Predator Act (Kansas Act) violated the prisoner's substantive Due Process rights under the Constitution's Fourteenth Amendment and that a convicted criminal, such as Hendricks, may not be held as a mentally ill person because of criminal dangerousness.⁵⁹ Further, as applied to *Hendricks*, the constitutionality of the Act depends upon a showing of dangerousness without a finding of mental illness.⁶⁰ The Kansas Act's definition of abnormality did not satisfy what the Court perceived to be the United States Supreme Court's "mental illness" requirement and civil commitment context, nor did it address the Double Jeopardy or Ex Post Facto claims.⁶¹

In the mid to late 1990s, many states began initiating legislation of sexual predator laws, primarily community notification and registration of sexual predators. Fewer states developed legislation of the civil commitment of violent sexual predators. This fact may be due to the apparently higher stakes regarding the civil liberty issues of civil commitment laws. However, the increasing public concern about violent sexual offending and the prevention of such offending has become an important issue for legislatures to consider. Unfortunately, the courts and legislatures have difficulty defining mental illness and dangerousness as pertaining to sex offenders and distinguishing the civil commitment of sex offenders from traditional civilly committed mentally disordered individuals,

59. *Hendricks*, 912 P.2d at 140. By a four-three vote, the Kansas Supreme Court held that the Act violated Hendricks' substantive Due Process rights. *Id.* at 138. The court did not believe that the Act's "mental abnormality" provision fulfilled the constitutional "mental illness" requirement. *Id.* The court believed that the statute's preamble rejected the "notion that the targeted group of persons are mentally ill." *Id.* The court was concerned about the legislature's intent of segregating sexually dangerous offenders from the community. *Id.* They were concerned that treatment was incidental, and that there was a focus on incapacitation of the offenders. *Id.* Further, the court cited that the legislature did not believe that sex offenders were treatable in the first place and that treatment for this class of offenders was not available. *Id.* They reasoned that if there was nothing to treat, then there was no mental illness. *Id.* See also Stephan R. McAllister, *Sex Offenders and Mental Illness: A Lesson in Federalism and the Separation of Powers*, 4 PSYCHOL. PUB. POL'Y & L. 268, 286 (1998).

60. *Hendricks*, 912 P.2d at 138. The State's own evidence in this case was that Hendricks was being committed despite not suffering from mental illness. *Id.* They believed that his criminal offenses were not due to a mental illness and that he was not mentally ill. *Id.*

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

such as insanity acquittees.

III. KANSAS SUPREME COURT DECISION

The Supreme Court of Kansas agreed with the *Hendricks* majority that the Mental Abnormality Violent Sexual Predator Law was unconstitutional.⁶² Kansas appealed to the United States Supreme Court. The Kansas Supreme Court's reasoning was consistent with *Foucha* and held that under the Mental Abnormality Violent Sexual Predator Law there needs to be a finding of mental illness and dangerousness.⁶³

The only authority cited by the State was in *Young v. Washington*, where the Washington Supreme Court addressed the element only of dangerousness, never mentioning mental illness.⁶⁴ The court did not find that "mental illness" had to be medically defined for the mental illness requirement supporting the Mental Abnormality Violent Sexual Predator Law.⁶⁵

One of the main issues in *Hendricks* was the court's definition of mental illness. The State's principal evidence concerning Hendricks' mental state was the testimony of Charles Befort, the chief psychologist at Larned State Security Hospital.⁶⁶ Dr. Befort testified that in his expert opinion, Hendricks was not suffering from either a mental illness or personality disorder.⁶⁷ Dr. Befort described a person with a personality disorder as an individual who has a set of characteristics or traits that are deranged; that has traits or characteristics that tend to result in their behaving in fairly standard predictable ways through most situations.⁶⁸ It becomes a disorder when those traits and characteristics result in the person behaving, thinking, or otherwise acting in such a way that causes them trouble, causes society trouble, or is considered abnormal.⁶⁹

Dr. Befort described persons with antisocial personalities as "individuals with disregard for social expectations, social values, so-

62. See Morse, *supra* note 27, at 252-53.

63. *Hendricks*, 912 P.2d at 130.

64. 857 P.2d 989 (Wash. 1993). The court held that Washington State's Community Protection Act of 1990 (codified as RCW § 71.09) for sexually violent predators violates petitioners' rights to substantive Due Process and violates the constitutional prohibition against Ex Post Facto laws and double jeopardy. *Id.* at 1025.

65. *Hendricks*, 912 P.2d at 137.

66. *Id.* at 138.

67. *Id.*

68. *Id.*

69. *Id.*

cial norms, their behavior indicates their disrespect or unconcern about staying within acceptable boundaries and behavior and consists of traits or characteristics which tend to produce in most situations predictable but unacceptable or abnormal behavior."⁷⁰ Dr. Befort testified that "pedophilia is not considered a personality disorder but is considered a mental abnormality."⁷¹ After evaluating Hendricks, Dr. Befort did not believe Hendricks had a personality disorder.⁷² The term "personality disorder" was not defined in the Sexually Violent Predator Act.⁷³ Dr. Befort did not believe "abnormality" was to be used as a formal diagnosis.⁷⁴ The Kansas Supreme Court reasoned that the term "mental abnormality" is not a psychiatric or medical term, but rather, a legal term defined in the Sexually Violent Predator Act.⁷⁵

Mental illness is defined in the Kansas Act.⁷⁶ The *Hendricks* court held that the State's evidence did not support a finding of "mental abnormality or personality disorder," as set forth in the

70. *Id.* at 137. Dr. Befort testified that a pedophile is predisposed to commit sexual acts with children. He believed it likely that Hendricks would engage in predatory acts of sexual violence or sexual activity if permitted to do so and "behavior is a good predictor of future behavior." *Id.* at 260.

71. *Id.* at 138.

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.* The Kansas Sexually Violent Predator Act, KAN. STAT. ANN. § 59-2902(b) (1996) provides: "mental abnormality means 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 to menacing the health and safety of others." *Id.* The term "mental abnormality" is similar to the word "insanity" as it is a legal term, and not a medical or psychiatric term. *Id.* at 138. The Kansas Legislature was concerned about a small but dangerous group of sex offenders who do not suffer from a mental disease or defect that would allow them to be involuntarily civilly committed pursuant to the State's general involuntary commitment proceedings such as not guilty by reason of insanity. *Id.* Sexually violent predators differ from traditional civil committed individuals as they often suffer from antisocial personality disorder and are not amenable to treatment and are likely to re-offend. *Id.* The Legislature reasoned that the recidivism rate of this unique type of offender is so high and the existing traditional involuntary civil commitment procedure is inadequate to serve both the sex offenders' treatment needs and society's safety. *Id.* The Legislature also reasoned that the prognosis for treating sex offenders in prison is poor and that the treatment needs are long-term and of different modality than of other traditionally committed individuals. *Id.*; see also KAN. STAT. ANN. § 59-2901 (1994).

76. KAN. STAT. ANN. § 59-2902(h) (1996) defines mental illness as any person who: "(1) is suffering from a severe mental disorder to the extent that the person is in need of treatment; (2) lack of capacity to make an informed decision concerning treatment; and, (3) is likely to cause harm to others." *Id.*

Kansas Act.⁷⁷ The court held that the Act violated provisions of the Constitution as set forth in *Foucha*.⁷⁸ To arrive at this conclusion, the Kansas Supreme Court cited Justice White, writing for the majority of the United States Supreme Court in *Foucha*, stating that to indefinitely confine a dangerous individual who has a personality disorder or antisocial personality, but is not mentally ill, is constitutionally impermissible.⁷⁹ In short, to indefinitely confine a dangerous individual who only has a mental abnormality is unconstitutional.

The Kansas Supreme Court acknowledged that Hendricks was civilly committed even though he did not suffer from mental illness and was not mentally ill; but it pointed out that the criminal acts for which he was in prison were not due to mental illness.⁸⁰ The court concluded that the Act was only constitutional if an individual such as Hendricks was dangerous without a finding of mental illness.⁸¹ The court concluded the Act violated Hendricks' substantive Due Process rights due to the lack of finding mental illness.⁸²

The Due Process Clause of the Fourteenth Amendment to the United States Constitution requires that according to the statute, in order for an individual to be involuntarily committed for control, care, and treatment, the State must prove by clear and convincing evidence that the individual is classified as mentally ill and dangerous.⁸³ Under the Act, the State is required to treat mentally ill individuals who are civilly committed. Under the statute, the State must release them when they are no longer mentally ill.⁸⁴

The *Hendricks* court cited *Foucha* where the State of Louisiana

77. *Hendricks*, 912 P.2d 138.

78. *Id.*

79. *Id.* See also *Foucha v. Louisiana*, 504 U.S. 71, 78 (1992).

80. *Hendricks*, 912 P.2d 138.

81. *Id.*

82. *Id.*

83. *Id.* at 139 (Lockett, J., concurring). The concurring opinion by Justice Lockett concentrated on the importance of the United States Constitution and the Due Process Clause of the Fourteenth Amendment. *Id.* Justice Lockett opined that Hendricks was not mentally ill but had an antisocial personality disorder. *Id.* Therefore, he could be civilly committed for treatment and incapacitation in order to protect the community. *Id.* Hendricks committed sex crimes against children for which he was sentenced to prison. *Id.* Justice Lockett reasoned that the State could have incarcerated Hendricks indefinitely, even until his death without violating the Constitution. *Id.* He opined that Hendricks, although suffering from antisocial personality disorder, should have been released since he had served his full prison term. *Id.*

84. *Hendricks*, 912 P.2d 140.

decided that a defendant like Hendricks, who has committed a criminal offense and suffers from antisocial personality disorder that leads to violence and is not treatable, may be deemed mentally ill and civilly committed.⁸⁵ In *Foucha*, the United States Supreme Court opined that under Louisiana's rationale, any individual with a personality disorder that may lead to a criminal offense may be civilly committed indefinitely even if he were not mentally ill or criminally insane.⁸⁶ The Court held that a criminal defendant such as Hendricks who completed his prison term may not be held as a mentally ill individual based on a risk of criminal dangerousness.⁸⁷

The Supreme Court of Kansas decided that the Act was unconstitutional due to the lack of finding of mental illness required to civilly commit Hendricks and violation of the Due Process Clause. The State of Kansas appealed the decision to the United States Supreme Court.

IV. U.S. SUPREME COURT'S MAJORITY OPINION OF *KANSAS V. HENDRICKS*: THE COURT ADDRESSES "MENTAL ABNORMALITY"

The United States Supreme Court reversed the decision of the Kansas Supreme Court. The United States Supreme Court ruled that civil commitment of sexually violent predators did not violate the substantive Due Process requirements and did not violate the United States Constitution's Double Jeopardy Clause or Ex Post Facto Clause.⁸⁸

The Court reasoned that the definition of "sexually violent predator" in a statute concerning civil commitment of sexually violent predators requires that a person "has been convicted of or charged with a sexually violent offense and . . . suffers from a mental abnormality or personality disorder which makes the person likely to engage in the predatory acts of sexual violence."⁸⁹ The personality disorder is usually antisocial personality disorder, which is not amenable to "existing mental illness treatment modalities [which] render them likely to engage in sexually violent behav-

85. *Id.* at 139.

86. *Foucha v. Louisiana*, 504 U.S. 71, 72 (1992).

87. *Hendricks*, 912 P.2d 140.

88. *Kansas v. Hendricks*, 521 U.S. 346, 371 (1997). The Court had a close, five to four split decision in this case. *Id.* at 348.

89. *Id.* at 352. "Mental abnormality" is not defined in the AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (4th Ed. 1994) (DSM-IV).

ior.”⁹⁰ The defendant must suffer from a mental condition affecting personality and emotional traits or volitional capacity, which can be precursors for the person to commit sexually violent acts, ultimately placing society in danger.⁹¹

The definition of “mental abnormality” requires a finding of both dangerousness and a volitional inability to control dangerousness.⁹² A civil commitment statute may be upheld where it involves a combination of dangerousness and some type of mental disorder, which limits involuntary civil commitment to individuals who have a volitional impairment leaving them dangerous.⁹³

The Court reasoned that the Kansas Act was similar to other statutes it upheld as it had a pre-commitment requirement of a “mental abnormality” or a “personality disorder,” and therefore narrowed the class of persons who could be eligible for confinement to those who are unable to control their dangerousness.⁹⁴

Further, the Court reasoned that a diagnosis of pedophilia qualifies as a “mental abnormality” and does not violate Due Process rights.⁹⁵ The Supreme Court ruled that the pre-commitment condition of a “mental abnormality” satisfied what the Court perceived to be the “substantive” Due Process requirement that involuntary civil commitment must be predicated on a finding of “mental illness.”⁹⁶ The Court determined that because the Act was civil in nature, the civil commitment of a sex offender did not constitute

90. *Hendricks*, 521 U.S. at 351.

91. *Id.* at 352. The Act does not violate substantive Due Process of the Fourteenth Amendment. *Id.* at 371.

92. *Id.* at 358.

93. *Id.* The statute requires more than a propensity or predisposition to violent acts, rather it requires a history of sexually violent behavior and a current mental condition that creates a likelihood of future sexual violence when released. *Id.* at 357. Dangerousness alone is insufficient to justify civil commitment for sex offenders. *Id.* at 358. The Court has “sustained civil commitment statutes when they have coupled proof of dangerousness with the proof of some additional factor, such as a ‘mental illness’ or ‘mental abnormality.’” *Id.*

94. *Id.*

95. *Id.* at 360. Pedophilia is a recognized category of paraphilia (sexual disorder) which is a disorder characterized by “recurrent, intense sexually arousing fantasies, sexual urges, or behaviors that involve unusual objects, activities, or situations and cause clinically significant distress or impairment in social, occupational, or other important areas of functioning.” AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (4th ed. 1994) (DSM-IV). They include Sexual Masochism, Sexual Sadism, Transvestic Fetishism, Voyeurism, and Paraphilia Not Otherwise Specified. *Id.*

96. *Hendricks*, 521 U.S. at 350

a criminal proceeding.⁹⁷ Because commitment under the Act is not “punishment” and does not violate the Double Jeopardy Clause, Hendricks’ commitment following the completion of a prison term was allowed.⁹⁸

The Kansas statute’s provision for the civil commitment of a sexually violent predator does not violate the United States Constitution’s prohibition of Ex Post Facto laws.⁹⁹ The Ex Post Facto Clause “forbids the application of any new punitive measure to a crime already consummated.”¹⁰⁰ The Supreme Court determined that the Act does not impose punishment and does not have a punitive purpose.¹⁰¹ Further, the Court believed that the Act did not have a retroactive effect. Rather, the Act allows for the civil commitment of a sex offender if that individual currently suffers from a “mental abnormality” or “personality disorder” and is a dangerous risk to society.¹⁰² The Court opined that the Act “does not criminalize conduct legal before its enforcement, nor deprive Hendricks of any defense that was available to him at the time of his crimes, the Act does not violate the Ex Post Facto Clause.”¹⁰³

The United States Supreme Court recognized in both *Hendricks* and *Foucha* that freedom from physical restraint and confinement have always been at the center of the liberties protected by Due Process rights from arbitrary governmental action.¹⁰⁴ The states allow forcible civil commitment of individuals who are unable to control their behavior and pose a danger to the safety of the community.¹⁰⁵ The Court has upheld involuntary commitment statutes as long as the confinement occurs pursuant to appropriate procedures.¹⁰⁶

97. *Id.* at 369.

98. *Id.* See also *Baxstrom v. Herold*, 383 U.S. 107, 115 (1966) (holding that civil commitment following the expiration of a prison term does not offend double jeopardy principles).

99. *Hendricks*, 521 U.S. at 371.

100. *Id.* at 370. See *Cal. Dep’t of Corr. v. Morales*, 514 U.S. 499, 505 (1995) (quoting *Lindsey v. Washington*, 301 U.S. 397, 401 (1937)).

101. *Hendricks*, 521 U.S. at 369.

102. *Id.* at 371.

103. *Id.*

104. See *id.* at 356; *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992); *Jacobson v. Massachusetts*, 197 U.S. 11, 26 (1905). The United States Supreme Court has held that there are times when complete restraints on an individual are necessary for the common good. *Jacobson*, 197 U.S. at 26. Otherwise, a society could not exist under safe conditions. *Id.*

105. *Hendricks*, 521 U.S. at 357.

106. *Id.* See also *Foucha*, 504 U.S. at 80; *Addington v. Texas*, 441 U.S. 418, 426-

The Act requires a finding of danger to self or others in order to be civilly detained.¹⁰⁷ In order to be committed under civil commitment proceedings, one has to be convicted of or charged with a sexually violent offense and “suffer from a mental abnormality or personality disorder that makes the person likely to engage in the predatory acts of sexual violence.”¹⁰⁸ Thus, the statute requires proof of more than a predisposition to violence as it requires proof of past sexually violent behavior and a present mental state that creates a likelihood of similar behavior if the person is not detained.¹⁰⁹ A finding of dangerousness alone is not sufficient to justify indefinite involuntary civil commitment.¹¹⁰

The Supreme Court has sustained civil commitment statutes when they have combined evidence of dangerousness with evidence of some other factor such as “mental illness” or “mental abnormality.”¹¹¹ The added statutory requirements limit involuntary civil commitment of sex offenders who suffer from a volitional impairment predisposing them to uncontrollable behavior.¹¹² The Court declared that the pre-commitment requirement of “mental abnormality” or “personality disorder” is consistent with the requirements of other civil commitment statutes that it has sustained because the requirement classifies a small class of individuals eligi-

427 (1979).

107. *Hendricks*, 521 U.S. at 357.

108. *Id.* (quoting KAN. STAT. ANN. § 59-2902(a) (1994)).

109. *Id.*

110. *Id.*

111. *Id.* at 358. See *Heller v. Doe*, 509 U.S. 312, 314-15 (1993) (discussing Kentucky statute permitting commitment of “mentally retarded” or “mentally ill” in dangerous individuals); *Allen v. Illinois*, 478 U.S. 364, 366 (1986) (discussing Illinois statute permitting commitment of “mentally ill” and dangerous individuals). In *Allen*, the Court stated that the “State serves its purpose of treating rather than punishing sexually dangerous persons by committing them to an institution expressly designed to provide psychiatric care and treatment.” *Allen*, 478 U.S. at 373. The Court held that Allen did not demonstrate that “sexually dangerous persons” in Illinois are confined under conditions incompatible with the State’s asserted interest in treatment. *Id.* Had he shown “that the confinement of such persons imposes upon them a regimen which is essentially identical to that imposed upon felons with no need for psychiatric care, this might well be a different case.” *Id.* The Court stated that nothing in the record indicated that there were no relevant differences between confinement in a prison versus confinement in a psychiatric facility. *Id.* at 374. The Court could not say that the conditions of his confinement amounted to punishment and thus rendered criminal the proceedings which led to confinement. *Id.* See also *Minnesota ex rel. Pearson v. Probate Court*, 309 U.S. 270, 271-72 (1940) (discussing Minnesota statute permitting commitment of dangerous individuals with “psychopathic personality”).

112. *Hendricks*, 521 U.S. at 358.

ble for commitment to those who cannot control their dangerousness.¹¹³

The categorization of a particular proceeding as civil or criminal is a question of statutory construction.¹¹⁴ In *Allen*, the United States Supreme Court held that proceedings under the Illinois Sexually Dangerous Persons Act were “not criminal” within the meaning of the Fifth Amendment’s guarantee against compulsory self-incrimination.¹¹⁵ The Court stated that in addition to proving the sex offense, the State also needed to prove an existence of a mental disorder for more than one year and a likelihood of committing future assaults.¹¹⁶

The Court noted that Kansas’ goal of creating a civil proceeding was founded upon its establishment of a civil commitment procedure and placement of the Act within the Kansas probate code, rather than the criminal code.¹¹⁷ The Kansas Act’s aim is to provide treatment, not punishment, for persons adjudged sexually dangerous and to protect the public from harm.¹¹⁸ The Act indicates that “the State cannot file a sexually dangerous person petition under the Act unless it has already filed criminal charges against the person in question, and thus has chosen not to apply the Act to a larger class of mentally ill persons who might be found sexually dangerous.”¹¹⁹ The Act does not change a civil proceeding into a criminal proceeding.

The Court reasoned that nothing on the face of the Kansas Sexually Violent Predator Act suggests that the Kansas Legislature intended to create anything other than civil commitment legislation.¹²⁰ The Court further reasoned that the Act does not implicate either of the two primary objectives of criminal punishment including retribution or deterrence.¹²¹ The Court went on to note that the Act’s purpose, however, is not retributive because it does not place responsibility for prior sex offenses on the defendant, and it does not make criminal conviction a prerequisite for commitment.¹²² Rather, evidence of prior sex offenses is used to demon-

113. *Id.*

114. *Id.* (citing *Allen*, 478 U.S. at 368).

115. *Allen*, 478 U.S. at 374.

116. *Id.* at 370-71.

117. *Hendricks*, 521 U.S. at 361.

118. *See id.* at 361-62.

119. KAN. STAT. ANN. § 59-2902 (1996).

120. *Hendricks*, 521 U.S. at 361.

121. *Id.* at 361-62.

122. *Id.* at 362.

strate a “mental abnormality” or future sex offending risk.¹²³ The Court reasoned that the absence of the required criminal culpability indicates that the State is not seeking retribution for past conduct.¹²⁴

The scienter requirement is traditionally an important element when differentiating criminal and civil laws.¹²⁵ The Court stated that a civil proceeding does not require a finding of scienter to commit a sexually violent predator. Rather, the commitment decision is based upon the determination of a “mental abnormality” or “personality disorder” instead of one’s criminal intent.¹²⁶ Further, the Act does not have a deterrent effect on a person with a mental abnormality or personality disorder. This is due to the fact that such persons are unlikely to be deterred by the threat of confinement because they cannot control their behaviors.¹²⁷ Additionally, the conditions at institutions for civil confinement are essentially the same as the conditions for people involuntarily committed at most mental hospitals because the former are not placed in a more restrictive environment.¹²⁸ Neither party in this case asserted that people who are civilly committed are subject to punitive conditions, and therefore the Court concluded that civil commitment at such institutions is not “punishment.”¹²⁹

Historically, the Court has held that restraint of a dangerously mentally ill individual has been regarded as a legitimate, non-punitive objective.¹³⁰ The potentially indefinite duration of confinement is not associated with a punitive objective, but to the purpose of holding a person until his mental abnormality no longer causes him to be a danger to society.¹³¹ The defendant is allowed immediate release upon showing that he is no longer dangerous.¹³² It was also determined that the Kansas Sexually Violent Predator Act is not necessarily punitive if it fails to offer treatment where

123. *Id.*

124. *Id.*

125. *Id.* See also *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168 (1963).

126. *Id.* at 362.

127. *Hendricks*, 521 U.S. at 362-63.

128. *Id.* at 363.

129. *Id.* The Court stated that if detention for the purpose of protecting society from harm necessarily constituted punishment, then all civil commitment statutes would be considered punishment. *Id.*

130. *Id.* See generally *United States v. Salerno*, 481 U.S. 739, 746-48 (1987); *Bell v. Wolfish*, 441 U.S. 520, 536-37 (1979); *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 165-67 (1963).

131. *Hendricks*, 521 U.S. at 363.

132. *Id.* (citing KAN. STAT. ANN. § 59-2907 (1994)).

treatment for a condition is not possible or treatment billed possible is merely supplementary, rather than an overriding state concern.¹³³

The Supreme Court agreed that the Kansas Sexually Violent Predator Act's definition of "mental abnormality" satisfied substantive Due Process requirements.¹³⁴ In the past, some states have, in unique circumstances, allowed for civil commitment of individuals who are unable to control their behavior and who present a risk for future sex offending.¹³⁵ The Kansas Act requires a finding of dangerousness to oneself or others in order to qualify for civil commitment.¹³⁶ Civil commitment can be initiated only when a person "has been convicted of or charged with a sexually violent offense," and "suffers from a mental abnormality or personality disorder which makes the person likely to engage in acts of sexual violence."¹³⁷ The statute requires proof of violence, more specifically sexually violent behavior, and a present mental condition that creates a likelihood of future sexual violence. Dangerousness alone, however, is not a sufficient ground upon which to justify indefinite involuntary commitment.¹³⁸ The Court noted that in the past it has sustained several criminal statutes when the statutes combined dangerousness with proof of some additional factors such as "mental illness" or "mental abnormality."¹³⁹

The Kansas Sexually Violent Predator Act is a civil commitment statute requiring a finding of future dangerousness that is associated with the existence of a "mental abnormality" or "personality disorder" that makes it difficult for the person to control his behavior.¹⁴⁰ Hendricks argued that the Supreme Court's past cases require a finding of "mental illness" for civil commitment and that "mental abnormality" is not attributed to a mental illness because it

133. *Id.* at 367.

134. *Id.* at 356, 371. The Court asserted that while freedom from restraint is a fundamental liberty protected by the Due Process Clause, it is not absolute. While normally this theory is applied in the criminal arena, the Court acknowledged that an individual's constitutionally protected interest in avoiding physical detention may be overridden even in the civil context. *Id.* at 356.

135. *Id.* at 357.

136. *Id.* (citing KAN. STAT. ANN. § 59-2902(a) (1994)).

137. *Id.*

138. *Id.*

139. *Id.* at 358.

140. KAN. STAT. ANN. § 59-2902(B) (1994). The Court stated that the requirement of "mental abnormality" and "personality disorder" follows the requirements of other past statutes the Court has sustained that classify a small group of persons eligible for detention who are unable to control their behavior.

is a term labeled by the Kansas Legislature rather than by the psychiatric community.¹⁴¹ The Court reasoned that the term “mental illness” lacks any significance because psychiatrists disagree frequently on what constitutes mental illness. But the Court itself has used evaluative terms describing mental conditions of those people who could be civilly committed.¹⁴²

Mental health professionals indicated that Hendricks suffered from pedophilia, a condition mental health professionals qualify as a serious disorder.¹⁴³ While Hendricks admitted that he was “stressed out and could not control the urge to molest children,” the Court reasoned that this lack of volition along with the risk of future sexual recidivism differentiated Hendricks from other dangerous persons who were dealt with through criminal proceedings.¹⁴⁴ The Court held that Hendricks’ diagnosis as a pedophile qualifies as a mental abnormality under the Act and satisfies Due Process purposes.¹⁴⁵

Hendricks argued that the indefinite duration of confinement was punitive, while the Court argued that the purpose of the commitment was to detain a person until the mental abnormality ceased and he is no longer a threat to others.¹⁴⁶ The Court cited that the maximum amount of time that an individual could be incapacitated pursuant to civil commitment proceedings was one year.¹⁴⁷ If detention continues beyond one year, a court must once again determine beyond a reasonable doubt that the defendant satisfies the same standards as required for the initial detainment.¹⁴⁸ The Act does not intend to force the defendant to remain confined any longer than the time during which he suffers from a “mental abnormality,” rendering him unable to control his dangerousness.¹⁴⁹

Hendricks argued that the Act is punitive because it does not

141. *Hendricks*, 521 U.S. at 358-59.

142. *Id.* at 360. Mental health professionals often struggle with the requirement that victims of pedophiles be “generally age 13 or younger” because sometimes a defendant will have victims that are twelve and fourteen years of age that look younger or older than their ages, making a specific diagnosis of Pedophilia difficult. See AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (4th ed. 1994) (DSM-IV).

143. *Hendricks*, 521 U.S. at 360.

144. *Id.*

145. *Id.*

146. *Id.* at 363.

147. KAN. STAT. ANN. § 59-2908 (1994); *Hendricks*, 521 U.S. at 364.

148. *Hendricks*, 521 U.S. at 364.

149. *Id.*

offer sex offenders any legitimate “treatment.”¹⁵⁰ He argued that confinement under the Act is in essence disguised punishment.¹⁵¹ He argued that treatment for his condition and problems is available but the State has refused and failed to provide it.¹⁵² He argued that the Legislature believes that sexually violent predators are not amenable to treatment under the Kansas Involuntary Commitment Statute and if there is nothing to treat under the statute then there is no mental illness.¹⁵³

The United States Supreme Court historically has held that under the appropriate circumstances, and when implemented by adequate procedures and safeguards, incapacitation is allowed under civil law.¹⁵⁴ The Court reasoned that while it has sustained civil commitment laws that have goals to incapacitate and treat, it has never held that the Constitution prevents a state from civilly committing individuals who cannot be treated, but who still present a risk to society.¹⁵⁵ The Court reasoned that even if it accepted that the provision of treatment was not the Kansas Legislature’s “overriding” or “primary” purpose in passing this Act, this does not rule out the possibility that an alternative objective of the Act was to

150. *Id.* at 365.

151. *Id.*

152. *Id.*

153. *Id.* The Court considered the Kansas Supreme Court’s assumption that it is clear that the overriding concern of the legislature is to continue the segregation of sexually violent offenders from the public. Treatment with the goal of reintegrating them into society is incidental, at best. The record reflects that treatment for sexually violent predators is all but nonexistent. The legislature concedes that sexually violent predators are not amenable to treatment under the existing Kansas involuntary commitment statute.

See id. (quoting *Hendricks*, 912 P.2d at 136). The Court considered it possible to interpret the Kansas Supreme Court’s assumption that *Hendricks*’ condition was untreatable under the existing civil commitment law, and the Act’s purpose was incapacitation of the offenders. *Id.* The Kansas Supreme Court stated that absent a treatable mental illness, *Hendricks* could not be held against his will. *Id.*

154. *Hendricks*, 521 U.S. at 365-66 (citing *Allen*, 478 U.S. at 373; *Salerno*, 481 U.S. at 748-49).

155. *Id.* at 366. In *Ethical Dilemmas for the Mental Health Professional: Issues Raised by Recent Supreme Court Decisions*, 34 CAL. W. L. REV. 177 (1997), David L. Shapiro, Ph.D., noted that Justice Burger’s dissenting opinion raised the issue that a disturbing aspect of the Kansas statute was that Kansas, and other states that might initiate similar laws, fails to provide the necessary treatment. This form of involuntary detainment could be pursued even if there was no treatment available for this mental disorder. The purpose of the confinement would be the prevention of antisocial behavior and criminal offending rather than treatment of the defendant. *Id.* at 200.

provide treatment. In addition, it does not require the Court to conclude that the Act was punitive.¹⁵⁶ The Court stated that it would be of insignificant worth to mandate treatment as a precondition for civil commitment of the dangerously insane when there were no feasible treatment programs for that population.¹⁵⁷ The Court further posited that the treatment program initially offered Hendricks may have been somewhat inadequate, but that he was the first person committed under the Act.¹⁵⁸ Further, Hendricks was placed under supervision of the Kansas Department of Health and Social and Rehabilitative Services, housed separately from the general prison population, and not served by employees of the Department of Corrections.¹⁵⁹

The Court considered that states have broad discretion and autonomy in developing treatment programs for mentally ill people.¹⁶⁰ In *Allen*, the Court concluded that “the State serves its purpose of treating rather than punishing sexually dangerous persons by committing them to an institution specifically designed to provide psychiatric care and treatment.”¹⁶¹

Concurring, Justice Kennedy cautioned against dangers inherent when a civil confinement law is used in combination with a criminal process, whether or not the law is given retroactive treatment.¹⁶² He also cautioned that the practical effect of the Kansas Act is to perhaps detain the offenders for life.¹⁶³ Justice Kennedy warned that civil commitment should not be used as a replacement or supplement for the criminal process.¹⁶⁴ In his view, the Kansas

156. *Hendricks*, 521 U.S. at 367.

157. *Id.*

158. *Id.* at 367-68.

159. *Id.* at 368.

160. *Id.* See also *Youngberg v. Romeo*, 457 U.S. 307 (1982). The Court held that “the State has considerable discretion in determining the nature and scope of its responsibilities.” *Id.* at 317.

161. *Hendricks*, 521 U.S. at 368 (citing *Allen*, 478 U.S. at 373).

162. *Id.* at 371-72.

163. *Id.* at 372. At the time the case was published, Justice Kennedy expressed concern that because it is impossible to predict future types of treatments for sex offenders, psychiatrists and other professionals engaged in treating pedophilia may be reluctant to find measurable success in treatment even after a long period. Therefore, mental health professionals may not be able to forecast that releasing the detainee would not put the public in danger. *Id.*

164. *Hendricks*, 521 U.S. at 372. Justice Kennedy asserted that based on Hendricks’ criminal record, he may have deserved a life term, which may have been the only sentence appropriate to protect society. The concern is whether it is the civil or criminal system that should make the initial decision regarding punishment. He stated that if the civil system is used to implement punishment after

statute requires a finding of dangerousness and adequately defines a mental condition that justifies involuntary commitment.¹⁶⁵ He argued that although incapacitation is a legitimate goal of both civil and criminal sentencing, retribution and deterrence are left for the criminal domain only.¹⁶⁶ Kennedy cautioned that if civil confinement of offenders was used as a general deterrent or for retribution purposes, "or if it were shown mental abnormality is too imprecise a category to offer a solid basis for concluding that civil detention is justified, our precedence would suffice to validate it."¹⁶⁷

The Court's majority held that the Kansas Act complied with the Due Process requirements and did not violate the Double Jeopardy protections afforded by the United States Constitution.¹⁶⁸ In addition, it emphasized that the Act did not represent a violation of Ex Post Facto lawmaking for persons who had already been sentenced prior to the imposition of the Act.¹⁶⁹

V. THE DISSENT OF *KANSAS V. HENDRICKS*

Justice Breyer dissented from the United States Supreme Court majority holding. He agreed with the majority on several points. Justice Breyer agreed that the Kansas Sexually Violent Predator Act's definition of a "mental abnormality" solidifies the substantive requirements of the Due Process Clause. But, according to Justice Breyer, the Act does not provide Hendricks with any treatment until after he is released from prison, and then only inadequate treatment, which represents an effort not to commit Hendricks civilly, but to inflict further punishment on him.¹⁷⁰ As a

the State makes an unwise plea bargain in the criminal system, then the civil system is not operating appropriately. In essence, in that type of scenario, the civil system could be adding additional punishment as a means of rectifying a lighter sentence imposed in the criminal case, and that would be wrong. *Id.* at 373.

165. *Id.*

166. *Id.* at 373.

167. *Id.*

168. *Id.* at 371.

169. *Id.*

170. *Id.* Justice Breyer agreed with the majority that the Due Process Clause allows Kansas to classify Hendricks, and sex offenders like him, as a mentally ill and dangerous person for purposes of civil commitment. Justice Breyer argued that the psychiatric profession classified Hendricks' problem as a serious mental disorder, but some professionals debate whether mental disorders such as paraphilias qualify as "mental illnesses." He stated that Hendricks' abnormality consists not only of a long history of antisocial acts but a specific and serious inability to control his actions. He pointed out that the law has historically considered this mental abnormality similar to the irresistible impulse standard in insanity

result, Justice Breyer reasoned that the Ex Post Facto Clause prevents the application of the Act to Hendricks who committed his crimes prior to the Act.¹⁷¹

Justice Breyer posited that the Kansas Act has a resemblance to civil commitment and traditional criminal punishment, as civil commitment entails a secure environment similar to imprisonment and incapacitation. Both of these serve the purpose of criminal punishment, which is to keep society from future harm.¹⁷²

The Kansas Sexually Violent Predator Act imposes its confinement upon an individual who has previously committed a criminal offense, making it similar to criminal punishment.¹⁷³ The Act initiates confinement through the use of similar persons involved in the criminal law procedures arena, such as county prosecutors. Furthermore, it utilizes similar procedures, such as jury trials and psychiatric evaluations for the courts, and similar standards such as “beyond a reasonable doubt.”¹⁷⁴ Civil commitment of mentally ill dangerous persons entails confinement and incapacitation; however, civil commitment based on a constitutional perspective remains civil.¹⁷⁵ Justice Breyer argued that these obvious resemblances alone cannot prove that Kansas’ civil commitment statute is criminal; neither can simply injecting the word “civil” into the statute prove that it is not criminal in nature.¹⁷⁶ Justice Breyer reasoned that when a state believes that treatment for sex offenders

defenses. Justice Breyer stated that because mental health professionals qualify pedophilia as a serious mental disorder, and Hendricks suffers from irresistible impulse and cannot control his urge to molest children due to pedophilia, and his pedophilia presents a danger to society, he believed that Kansas could classify Hendricks as “mentally ill” and “dangerous.” *Id.* at 374-77.

171. *Id.* at 373-74.

172. *Id.* at 379.

173. *Id.* at 380.

174. *Id.*

175. *Id.* (citing *Allen*, 478 U.S. at 369-70). Justice Breyer stated the fact that the offending behavior initiated civil commitment proceedings through the Act does not make a vital difference because the Act’s requirement of a prior crime by eliminating those whose past behavior does not indicate mental illness or future danger, “may serve an important noncriminal evidentiary purpose.” He believed the procedures serve an important noncriminal purpose, helping to prevent judgmental errors that might deprive an offender of his freedom. *Id.* at 371-372. Justice Breyer also cited *Salerno*, 481 U.S. at 739, where the Court held that preventive detention of a sexually dangerous person pending trial did not violate the defendant’s constitutional rights. The Court did not authorize the indefinite detention based on dangerousness of “insanity acquittees who are not mentally ill but who do not prove they would not be dangerous to others.” *Foucha*, 504 U.S. at 83.

176. *Hendricks*, 521 U.S. at 381.

does exist, and then combines that belief with a legislatively required delay of sex offender treatment until a person is at the end of his jail term, thus requiring further determination, this legislative scheme clearly takes on a light of punitive intent.¹⁷⁷

The Kansas Supreme Court described the Act's purpose as segregation of "sexually violent offenders" with their "treatment" being a matter that was "incidental at best."¹⁷⁸ The Kansas Supreme Court found that when Hendricks was committed the State had not funded treatment, it had not entered into treatment contracts, and it had poorly-trained staff to implement treatment.¹⁷⁹ Justice Breyer stated that the Kansas statute, as it applies to sex offenders who have already been convicted, "commits, confines, and treats those offenders *after* they have served virtually their entire criminal sentence."¹⁸⁰ The Act seems to postpone the diagnosis, evaluation, and commitment hearing until just a few weeks prior to the expected release of a previously convicted sex offender from prison. Justice Breyer stated that the "time-related circumstance" seemed deliberate.¹⁸¹

Justice Breyer questioned why the Act does not commit and

177. *Id.* Justice Breyer stated that he did not believe that *Allen* "means that a particular law's lack of concern for treatment, by itself, is enough to make an incapacitative law punitive." In *Allen*, "the Court considered whether for Fifth Amendment purposes, legal proceedings under an Illinois statute were civil or criminal." *Id.* at 381. The Illinois law allowed for the confinement of sex offenders who were sexually dangerous and who had committed at least one prior sex offense, and suffered from mental illness. *Id.* The Court found that the law was civil in nature because the State of Illinois had provided treatment for the offenders committed and there was a system in place that allowed the committed detainees to be released as soon as possible after serving their criminal sentence. *Id.* The Court found that the proceedings were civil rather than criminal because the law's overriding aim was to provide treatment rather than punishment. *Id.* The *Allen* Court focused on using treatment plans to assist in distinguishing between the civil and criminal purposes of the statute. *Id.* at 383. Justice Breyer stated that one would expect legislation motivated with a non-punishing intent that confines an offender because of a mental abnormality to assist in helping the offender battle his mental illness, assuming there was some effective treatment available. *Id.* In contrast, a law that provides confinement that does not include a medically sound treatment objective obviously represents a more punitive intent. *Id.* at 381-383 (citing *Allen* at 366 and 370).

178. *Id.* at 383 (Breyer, J., dissenting) (quoting *Hendricks*, 912 P.2d at 136).

179. *Hendricks*, 521 U.S. at 384 (Breyer, J., dissenting) (citing *Hendricks*, 912 P.3d at 131, 136). Justice Breyer stated that at the time, Hendricks' treatment facility was so poorly staffed that there was "essentially no treatment." *Hendricks*, 521 U.S. at 384 (Breyer, J., dissenting) (quoting the program's director).

180. *Id.* at 385 (Breyer, J., dissenting) (citing KAN. STAT. ANN. § 59-2903(a)(1) (1994)).

181. *Id.* (Breyer, J., dissenting).

require treatment of sex offenders sooner, before they even begin to serve their sentence.¹⁸² He argued that the Act, while stating treatment as a goal, effectively seeks only confinement.¹⁸³ Justice Breyer questioned why legislators, finding that rehabilitating an offender while in prison is unlikely, would create an Act that orders offenders to remain in that setting for a longer period of time before beginning treatment.¹⁸⁴ Justice Breyer suggested that if long-term treatment needs were the legislature's priority rather than punishment,¹⁸⁵ the State would require treatment to commence soon after the offender was convicted instead of years later near the end of the criminal sentence.¹⁸⁶

Justice Breyer reasoned that a failure to consider or use alternative methods to achieve a non-punitive goal can assist in showing that the legislature's purpose was to punish.¹⁸⁷ Conversely, he argued that "[l]egislation that seeks to help the individual offender as well as to protect the public would avoid significantly greater restriction of an individual's liberty than public safety requires."¹⁸⁸ Justice Breyer agreed with the Kansas Supreme Court's finding that "the timing of the civil commitment proceeding, and the failure to consider less restrictive alternatives, . . . suggest[s] . . . that for Ex Post Facto Clause purposes, the [Kansas Sexually Violent Predator Act] (as applied to previously convicted offenders) has a punitive, rather than a purely civil purpose."¹⁸⁹

182. *Id.* Justice Breyer opined that much of the treatment that Kansas offered can be given at the same time and place in prison where Hendricks served his punishment. *Id.* at 386. He pointed to the Act's aim to "respond to special 'long-term' 'treatment needs'" as an indication that "treatment should begin during imprisonment." *Id.* at 387.

183. *Id.* at 385-86.

184. *Id.* at 386.

185. *Id.* Justice Breyer noted the difference between being untreatable and being untreated, arguing that where "a State decides offenders can be treated and confines an offender to provide that treatment, but then refuses to provide it, the refusal to treat while a person is fully incapacitated begins to look punitive." *Id.* at 390.

186. *Id.* at 387.

187. *Id.* at 388. *See also* Bell v. Wolfish, 441 U.S. 520 (1979) (considering whether specific prison conditions were meant to be punitive). Justice Breyer suggested less restrictive alternatives to civil commitment such as release from prison on parole or to a halfway house, which were not considered. *Hendricks*, 521 U.S. at 387 (Breyer, J., dissenting).

188. *Hendricks*, 521 U.S. at 388 (Breyer, J., dissenting). Justice Breyer explained that legislation which focuses on confinement and incapacitation would probably not concern itself with less restrictive forms of incapacitation. *Id.*

189. *Id.* at 389. Justice Breyer found that of seventeen states with similar civil commitment laws for sex offenders, ten of those state laws require treatment of an

Justice Breyer argued that as an alternative to civil commitment of sex offenders, a state could sentence its offenders to the fully authorized sentence, seek consecutive rather than concurrent sentences, or implement recidivism statutes to lengthen imprisonment without violating the Ex Post Facto Clause.¹⁹⁰ He argued that a statute, such as the Kansas Act, that operates retroactively, would not offend the Ex Post Facto Clause “*if the confinement that it imposes is not punishment*,”¹⁹¹ or in other words, it does not in effect impose a second criminal punishment after a first one.¹⁹² Justice Breyer reasoned that the Kansas legislature “did not tailor the statute to fit the nonpunitive civil aim of treatment.”¹⁹³

Justice Breyer stated that the basic substantive Due Process question is whether the Due Process Clause requires Kansas “to provide treatment that it concedes is potentially available to a person whom it concedes is treatable.”¹⁹⁴ Justice Breyer considered the substantive Due Process question with analysis of whether Hendricks’ confinement violated the Constitution’s Ex Post Facto Clause previously discussed.¹⁹⁵ While he agreed with the majority opinion that the Act’s definition of “mental abnormality” qualified under the substantive requirements of the Due Process Clause, Breyer stated that the Act did not provide Hendricks with any treatment until after his release from prison, despite the professional belief his condition could be treated.¹⁹⁶ According to Breyer, that requirement indicated a punitive rather than civil intent of the legislation, which is in violation of the Ex Post Facto Clause.¹⁹⁷

offender to begin soon after he has been charged and incarcerated for the sex offense, while the remaining seven state laws involved the delay of commitment until the offender has served his criminal sentence in prison. *Id.* at 388-89. He also discussed a Texas statute that substituted civil commitment for criminal punishment stating that it was not an exercise of state power in a punitive sense and Texas confined “only for the purpose of providing treatment and care designed to treat the individual.” *Id.* at 390 (citing *Addington v. Texas*, 441 U.S. 418, 428 n.4 (1979)).

190. *Id.* at 395 (Breyer, J., dissenting).

191. *Id.* (emphasis in original)

192. *Id.*

193. *Id.* at 378.

194. *Id.*

195. *Id.*

196. *Id.* at 373.

197. *Id.*

VI. NEW JUDICIAL DEVELOPMENTS: *SELING V. YOUNG*

In *Seling v. Young*,¹⁹⁸ the United States Supreme Court upheld a commitment scheme for violent sexual predators similar to that in *Hendricks* as being civil and not criminal. Young, a convicted sex offender, was committed to a sex offender treatment facility through Washington State's Community Protection Act of 1990.¹⁹⁹ The Washington Supreme Court reasoned that Young's Double Jeopardy and Ex Post Facto claims depended on a determination of whether the Act was civil or criminal in nature.²⁰⁰ The court held that the Act was civil in nature.²⁰¹ In that regard, the court found that the legislature intended to create a civil scheme.²⁰² "The court distinguished the goals of incapacitation and treatment from the goal of punishment."²⁰³

Young next instituted a *habeas corpus* action seeking immediate release from his civil confinement in federal district court.²⁰⁴ The

198. 531 U.S. 250 (2001).

199. *Id.* at 253. Washington State's Community Protection Act of 1990, WASH. REV. CODE § 71.09.010 *et seq.* (1992) (Act) was implemented to address society's concerns about sexually dangerous offenders. *Seling*, 531 U.S. at 254. "One of the Act's provisions authorizes civil commitment of such offenders." *Id.*

The Act defines a sexually violent predator as someone who has been convicted of, or charged with, a crime of sexual violence and who suffers from a mental abnormality or personality disorder that makes the person likely to engage in predator acts of sexual violence if not confined in a secure facility. The statute reaches prisoners, juveniles, persons found incompetent to stand trial, persons found not guilty by reason of insanity and persons at any time convicted of a sexually violent offense who have committed a recent overt act.

Id. (citations omitted). At the commitment hearing, Young's experts stated that there was no mental disorder that makes a person likely to sexually re-offend and there is no way to accurately predict such recidivism. *Id.* at 255. An expert for the State testified that Young suffered from both a severe personality disorder and a severe paraphilia. *Id.* at 255-56. The State's expert concluded that his personality disorder, the length of time during which Young committed his crimes, his re-offending behaviors, his continued denial, and his lack of empathy and remorse made it more likely than not that he would sexually re-offend. *Id.* at 256. "The jury unanimously concluded that Young was a sexually violent predator." *Id.*

200. *Sering*, 521 U.S. at 256.

201. *Id.* at 256-57. In its reasoning, the court determined that the legislature intended to create a civil scheme, the Act's objectives were to provide necessary treatment for committed offenders with mental disorders and to protect society from future sex offending resulting from the mental abnormalities of the offenders, and that the Act's objectives were not focused on criminal responsibility. *Id.*

202. *Id.*

203. *Id.* at 257.

204. *Id.* at 258. Young claimed that the conditions of his detainment at the Center were punitive and violated his Due Process rights. *Id.* at 259. He believed

court initially granted the writ, concluding that the Act was unconstitutional.²⁰⁵ While an appeal of the writ was pending, the United States Supreme Court ruled in *Hendricks* that civil commitment of sexually violent predators was constitutional.²⁰⁶ The Court of Appeals for the Ninth Circuit remanded the case for reconsideration in light of *Hendricks*. The district court then denied Young's petition because it concluded that the Washington Act was civil and thus did not violate Young's constitutional rights under the Double Jeopardy and Ex Post Facto Clauses.²⁰⁷ The district court held that the Act was civil in nature, and therefore could not be deemed punitive as applied to a single individual.²⁰⁸ On appeal, the Court of Appeals for the Ninth Circuit did not read *Hendricks* to preclude the possibility that the Act could be punitive as applied, and invalidated despite its civil nature.²⁰⁹ The court remanded the case to the district court in order to determine whether the conditions at the treatment center would render the Act punitive.²¹⁰

Upon review, the United States Supreme Court held that the Washington Act was civil in nature.²¹¹ The Court stated that the Act provides offenders with the right to "adequate care and individualized treatment."²¹² The determination of whether a treatment facility is operating in accordance with state law is to be made by the Washington courts.²¹³ The Court indicated that because the Act

he had been confined in a manner harsher and more restrictive than those placed on individuals in "true" civil commitment facilities or even criminal prisoners. *Id.* Young pointed out that the Center was located entirely inside the perimeter of the larger Department of Corrections (D.O.C.) facility and in turn relied on the D.O.C. for all of its essential services, tying it even closer to a prison-like criminal setting. *Id.* at 259.

205. *Id.* at 258.

206. *Id.*

207. *Id.* at 259.

208. *Id.*

209. *Id.*

210. *Id.* at 260.

211. *Id.* In the dissent, Justice Stevens discussed Young's detailed allegations concerning both the absence of treatment for his alleged mental illness and the obvious punitive nature of the surroundings of the treatment facility. *Sering*, 521 U.S. at 277 (Stevens, J., dissenting). If proved, those allegations could establish that people detained pursuant to the statute are treated like those imprisoned for violations of criminal laws, and even that often times the treatment they receive is considerably worse. *Id.* If the allegations were true, the statute should be characterized as a criminal law in light of the purposes and principles of the Constitution. *Id.*

212. *Sering*, 521 U.S. at 265 (quoting WASH. REV. CODE §71.09.080(2) (Supp. 2000)).

213. *Id.*

was civil in nature and designed to incapacitate and treat detainees, Due Process required that the conditions and duration of confinement under the Act bear some reasonable relation to the purpose for which persons are committed.²¹⁴

VII. UNITED STATES SUPREME COURT'S MAJORITY OPINION: *KANSAS V. CRANE*: THE COURT ADDRESSES "EMOTIONAL ABNORMALITY"

In *Hendricks*, the Court addressed the volitional component of sex offending. Leroy Hendricks had a volitional mental abnormality, pedophilia, in which he had an insatiable desire for children, which was essentially an irresistible and uncontrollable impulse. In that case, the Court did not have to address the issue of emotional abnormality or personality disorders, which led an individual to commit sexually violent acts due to Hendricks' sexual disorder that was the impetus of his criminal behavior.

Recently, in *In re Crane*,²¹⁵ the Kansas Supreme Court acknowledged that the United States Supreme Court in *Hendricks* found an implied volitional requirement in the Act in order to find the law constitutional.²¹⁶ The Kansas Supreme Court stated that if an offender can control his actions, then his substantive Due Process rights are violated because the law is not so narrowly suited to restrict the liberty of avolitional or emotionally impaired sexually dangerous offenders.²¹⁷ Additionally, the State may not have a similar objective in detaining sexual offenders with some volitional control over their actions because there is a question of whether these offenders present the same threat to society as avolitional sexually dangerous offenders. The former may be more appropriately dealt with using traditional measures, such as criminal confinement and punishment.²¹⁸

In *Crane*, the Kansas Supreme Court stated that the Act does not formally require an inability to control one's actions as a prerequisite to civil commitment; rather, the Act also provides for the commitment of those offenders who suffer from an "emotional" or

214. *Id.*

215. 7 P.3d 285 (Kan. 2000).

216. *Id.* at 290. See Maureen O'Connor & Danny Krauss, *Legal Update: Constitutional Challenges to Sexually Violent Predator Laws Post Kansas v. Hendricks*, AM. PSYCHOL.-LAW SOC'Y NEWS, Div. 41, American Psychology Association, Vol. 21, No. 2, (Spring 2001).

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

218. *Id.*

218. *Id.* at 288.

a “volitional” impairment.²¹⁹ The Kansas Supreme Court held that the SVP law was unconstitutional when applied to Michael Crane, since, unlike Leroy Hendricks, Crane could exert some control over his behaviors.²²⁰

Crane argued whether it is permissible to commit him as a sexual predator without proving he was unable to control his sexually dangerous behavior.²²¹ The trial court held that the commission of a sexual offense and the existence of a mental disorder or personality disorder that made Crane more likely to re-offend are separate concepts and are not interdependent.²²² The court cited the U.S. Supreme Court’s holding in *Hendricks* that the State must only prove the existence of a mental abnormality that makes the defendant more likely to sexually re-offend.²²³ The district court held that even though experts might agree that Crane’s mental disorder does not impair his volitional control where he cannot control his behavior, the Kansas Act does not specifically require this element to be proven.²²⁴ The Kansas Supreme Court stated

219. *Id.*

220. *Id.* at 290. The Kansas Supreme Court stated that the Act may impact the United States Supreme Court’s ex post facto and double jeopardy analyses. *Id.* at 291. In making this evaluation, the court relied on the uncontrollability of the offender’s behavior in determining whether the commitment under the Act was civil in nature. *Id.* This analysis was similar to the one used by the Court in analyzing the substantive Due Process argument. *Id.* The court stated that the objective of the Act was not based on punishment or deterrence but instead on protection of society and treatment as a secondary concern. *Id.* at 292. In 1993, Michael Crane was convicted of lewd and lascivious behavior for exposing himself to another person. *Id.* at 286. His convictions of attempted aggravated criminal sodomy, attempted rape, and kidnapping that occurred the same day as the above incident, were reversed. *Id.* However, Crane was convicted of aggravated sexual battery for grabbing a store clerk from behind while exposed, and with his hands squeezed her neck, ordering her to perform oral sex on him while telling her he was going to rape her. *Id.* Crane ran out of the store before completing these sex acts. *Id.* At the commitment trial to determine whether Crane was a sexually violent predator, psychologist Douglas Hippe concluded that Crane suffered from antisocial personality disorder and exhibitionism, but that exhibitionism alone would not qualify him as a sexual predator. *Id.* at 286-87. Citing Crane’s increasing intensity of sex offending, disregard for others, aggressiveness and daring behaviors, Hippe opined that Crane should be labeled a predator due to the combination of antisocial personality and exhibitionism. *Id.* at 287.

221. *Id.* at 287. Crane argued that the trial court erred in ruling that the Supreme Court’s holding does not require proof of volitional impairment that prevents him from controlling his sexually deviant behavior, when the impairment is a personality disorder. *Id.*

222. *Id.*

223. *Id.*

224. *Id.*

that the Kansas Act does not expressly prevent detainment absent a finding of uncontrollable or volitional dangerousness.²²⁵

Crane continued to argue that the U.S. Supreme Court in *Hendricks* “read a volitional impairment requirement into the Kansas Act as a condition of its constitutionality” and that there needs to be a volitional impairment when the person’s mental disorder is a personality disorder rather than a mental abnormality.²²⁶ The Kansas Supreme Court held that the U.S. Supreme Court opinion in *Hendricks* does not formally include “consideration of willful behavior.”²²⁷ The court held that commitment under the Kansas Act—which defines mental abnormality as including behavior that is controllable and does not address behavior based on a personality disorder²²⁸—is unconstitutional without a finding that the defendant is volitionally impaired and cannot control his sexually dangerous behavior.²²⁹

The U.S. Supreme Court considered the State’s argument that the Kansas Supreme Court read *Hendricks* incorrectly by requiring proof that a sex offender is completely unable to control his behavior.²³⁰ The U.S. Supreme Court agreed with Kansas that the decision in *Hendricks* did not require “total or complete lack of control.”²³¹ The Supreme Court reasoned that “insistence upon

225. *Id.* at 289. The Kansas Supreme Court stated that the Kansas Act indicated a person could be committed if he has a sex offense or sex offense history, and is likely to engage in future sex offending behaviors. The legislature stated volitional capacity is the “capacity to exercise choice or will” and if this choice is affected, one could have problems controlling their behavior. Emotional capacity was identified as an “alternative faculty that could be affected by condition.” The court reasoned that defining emotional capacity in addition to volitional capacity regarding mental abnormality, was to include a source of bad behavior in addition to inability to control one’s behavior. The legislature included personality disorder as an alternative to mental abnormality, but did not define personality disorder. *Id.*

226. *Id.* at 290.

227. *Id.*

228. *Id.*

229. *Id.* The court stated that the personality disorder’s sufficiency for commitment standards has to be a question for the jury and they were not instructed to make a finding as to his inability to control his behavior. *Id.* The court cited Justice Thomas’ opinion in *Hendricks*, “a civil commitment must limit involuntary confinement to those who suffer from a volitional impairment rendering them dangerous beyond their control.” *Id.* (quoting *Hendricks*, 521 U.S. at 358).

230. *Kansas v. Crane*, 534 U.S. 407, 410-11 (2002).

231. *Id.* The Court indicated that in *Hendricks* the Act required a “mental abnormality” or “personality disorder” that makes it “difficult, if not impossible, for the [dangerous] person to control his dangerous behavior.” *Id.* at 410. The Court noted that “the word ‘difficult’ indicates that the lack of control element was not

absolute lack of control would risk barring the civil commitment of highly dangerous persons suffering severe mental abnormalities.²³² However, the Court did not agree with the State regarding its objective in permitting detainment of a dangerous sexual predator without any finding of a lack of control.²³³ The Court held that to justify civil commitment, a defendant must have some volition. It is not enough that a defendant has difficulty controlling his behavior.²³⁴

The State pointed out that the Kansas Supreme Court allowed the detainment of dangerous sex offenders who suffered from "mental abnormality" characterized by an "emotional" deficit and who did not suffer from a "volitional impairment."²³⁵ Contrarily, the U.S. Supreme Court stated that *Hendricks* only addressed volitional impairment rather than "emotional impairment."²³⁶ The Court cited a history of civil commitment cases of dangerous offenders that had difficulty controlling their behaviors.²³⁷ However, neither *Hendricks* nor *Crane*, considered whether detainment of sex offenders based only on "emotional" impairment was unconstitutional.²³⁸ Ultimately, the Court decided that one can be civilly committed as long as there is proof of some inability to control the sexually dangerous behavior, whether that inability is due to a volitional or emotional impairment.²³⁹

In the dissent, Justice Scalia contended that the Act allows for the detainment of convicted sex offenders if the State proves that the defendant suffers from: (1) a "mental abnormality" affecting his "emotional or volitional capacity that predisposes the person to

absolute." *Id.*

232. *Id.*

233. *Id.* at 413.

234. *Id.* The Court indicated that when reviewing all factors, including the nature of the psychiatric diagnosis, and severity of the mental abnormality, the proof of an individual's serious difficulty in controlling behavior must be adequate to distinguish a dangerous sex offender, whose serious mental illness makes him eligible for civil detainment from a person who is dangerous in the average criminal case. *Id.* See also *Hendricks*, 521 U.S. at 357-58; *Foucha v. Louisiana*, 504 U.S. 71, 82-83 (1992).

235. *Crane*, 534 U.S. at 414.

236. *Id.* *Hendricks* addressed pedophilia, which involved a lack of control. *Id.*

237. *Id.* at 415. The Court has never addressed the issues of volitional, cognitive, and emotional impairment together as it applies to civil commitment. *Id.*

238. *Id.* The Court vacated the Kansas Supreme Court's judgment and remanded the case. *Id.*

239. See *id.* at 415 (holding the *Hendricks* court did not have occasion to consider whether emotional impairment alone is enough to commit).

commit sexually violent offenses,” or (2) a “personality disorder,” as long as either places the defendant at a greater risk of sexually re-offending.²⁴⁰ Scalia disagreed with the majority’s opinion citing the Kansas Act’s language that requires a finding of future dangerousness, that the committed defendant is “‘likely to engage in repeated acts of sexual violence’ and then connects that finding to the existence of a ‘mental abnormality’ or ‘personality disorder’ *that makes it difficult, if not impossible, for the person to control his dangerous behavior.*”²⁴¹

Kansas’ Act allows for detainment of offenders upon the finding that a cause of the likelihood of re-offending is a “mental abnormality” or “personality disorder.”²⁴² Therefore, persons detained under the Act suffer from a “mental abnormality” or a “personality disorder” that prevents them from controlling their actions. It is presumed that these persons are not deterred by the threat of detainment.²⁴³ However, Scalia did not read the Act to say that “mental abnormality” contains a requirement of inability to control.²⁴⁴ He quoted the *Hendricks* Court, stating that the pre-commitment requirement of either a “mental abnormality” or “per-

240. *Id.* Scalia cites that one expert concluded that exhibitionism alone would not qualify for predator status, but when combined with antisocial personality disorder, there was sufficient evidence for predator classification. Further, the State’s expert indicated that Crane’s disorder did not impair his volitional control to the degree he could not control his sexually dangerous behavior. *Id.* at 416-17.

241. *Crane*, 534 U.S. at 418-19 (emphasis in original) (citing *Hendricks*, 521 U.S. at 358 and KAN. STAT. ANN. § 59-2902 (b) (1994)). Scalia stated that the majority relied on the italicized language to require a separate finding of inability to control behavior. *Id.* at 419.

242. *Id.* at 420. Scalia noted that normal offenders make a conscious choice to re-offend and are therefore open to deterrence provided through criminal proceedings and punishment, however, his concern is that defendants who are civilly committed due to their mental illness that is based on an affliction and not a conscious choice, are unlikely to be deterred under the Act. *Id.*

243. *Id.* at 421. Some may argue that civilly committed sex offenders who are dangerous and are committed due to a personality disorder, such as antisocial personality disorder, may be deterred. Many psychopaths, due to low cortical arousal and lack of anxiety and an inability to internalize punishment for example, are not deterred by punishment. The question is whether they cannot control their behavior due to a personality disorder. Scalia stated that the Court in *Crane* reopened a question of whether the Act cannot be applied because it allows for the commitment of offenders who have mental illnesses other than volitional problems. *Id.* The *Hendricks* Court did not consider that question.

244. *Id.* at 419. Scalia believed the Court was trying to say that the Act “required finding of a *causal connection* between the likelihood of repeat acts of sexual violence and the existence of a ‘mental abnormality’ or ‘personality disorder’ *necessarily* establishes ‘difficulty if not impossibility’ in controlling behavior.” *Id.* (emphasis in original).

sonality disorder” is consistent with the Court’s previous decisions regarding the confinement of dangerous offenders who are unable to control their behavior.²⁴⁵

Further, Scalia argued that the *Hendricks* opinion clearly addressed that the Act includes individuals who have personality disorders.²⁴⁶ Scalia asserted that “because *Hendricks* involved a defendant who indeed *had* a volitional impairment (even though we made nothing of that fact), its narrowest holding covers only *that* application of the SVPA, and our statement that the SVPA in its entirety was constitutional can be ignored.”²⁴⁷ Scalia proposed that distinguishing between volitional, cognitive, and emotional issues regarding civil commitment does not make sense because an offender may be able to exercise volition but continue to be dangerous; therefore, the offender should not be allowed in society.²⁴⁸

While Scalia agreed with the Court’s opinion in *Hendricks* that to be labeled a sexual violent predator, a jury would have to find that the defendant had been convicted of a sex offense(s), is suffering from a mental abnormality or personality disorder, and has a condition that renders him likely to commit future sex offenses, the Justice believed that the majority in *Crane* added another requirement—that the offender suffers from an inability to control his behavior.²⁴⁹ Scalia questioned how anyone can qualify or quantify for

245. *Id.* at 419 (quoting *Hendricks*, 521 U.S. at 358). Scalia believed that the existence of a mental abnormality or emotional or personality disorder that causes a likelihood of sex offending itself creates the requirement of “difficulty or impossibility” of control. *Id.* at 420. He further argued the jury verdict in *Hendricks* did not provide a separate finding of “difficulty, if not impossibility, to control behavior.” *Id.* This finding, Scalia argued, is included within the finding of *causing* future dangerousness. *Id.* (emphasis in original).

246. *Id.* at 421. Scalia again cited the Kansas Act, which includes emotional and volitional impairments. *Id.*

247. *Crane*, 521 U.S. at 422 (emphasis in original). Scalia argued that “the narrowest holding in *Hendricks* affirmed the constitutionality of commitment on the basis of the jury charge given in that case (to wit, the language of the SVPA); and since that charge did not require a finding of volitional impairment, neither does the Constitution.” *Id.* Scalia points out that the Court did uphold the constitutionality of the Act and did not deny *Hendricks* his Due Process although allowing for a precommitment requirement of a “mental abnormality” or “personality disorder.” *Id.* (citing *Hendricks*, 521 U.S. at 358).

248. *Id.* at 422.

249. *Id.* at 423. Scalia stated that this “inability is not an utter inability, or an inability in a particular constant degree, rather an inability in a degree that will vary in light of such features of the case as the nature of the psychiatric diagnosis, and the severity of the mental abnormality itself.” *Id.* Scalia does not believe the Court’s decision offers sufficient guidance to trial courts when instructing juries on volitional issues and inability to control. *Id.*

the jury what the “inability to control” based on a psychiatric diagnosis and “severity of mental abnormality” means.²⁵⁰ Scalia concluded that the jury determined that Crane suffered from antisocial personality disorder and exhibitionism, and that these mental disorders rendered him likely to sexually re-offend, which is all that both the United States Constitution and the Kansas Act require.²⁵¹

VIII. A SAMPLING OF PERTINENT STATE SUPREME COURTS’ APPROACHES TO CIVIL COMMITMENT AND SEXUAL PREDATOR STATUTES

In 1999, in *In re Linehan (Linehan IV)*,²⁵² the Minnesota Supreme Court considered a similar issue to the one in *Crane*, concerning a defendant’s volition or lack thereof, over his sexual behaviors and how this should relate to civil commitment.²⁵³ The

250. *Id.* Scalia sarcastically asked the question of how an attorney should quantify Mr. Crane’s inability to control his violence, “Ladies and Gentlemen of the jury, you may commit Mr. Crane under the SVPA only if you find, beyond a reasonable doubt that he is 42% unable to control his penchant for sexual violence.” *Id.* at 423-24.

251. *Id.* at 425. Scalia was clear in expressing his belief that the majority’s “holding would make bad law in any circumstance.” *Id.* at 424.

252. *In re Linehan*, 594 N.W.2d 867 (Minn. 1999).

253. *Id.* Dennis Linehan began sexually offending as a teenager and at age fifteen he sexually assaulted a four year-old girl, at nineteen he had intercourse with a thirteen year-old female, at twenty-two he engaged in window-peeping, and later that year he repeatedly raped a female. At twenty-three, he sexually assaulted and killed a fourteen year-old girl. He subsequently committed two more sexual assaults. He was convicted on those charges but later escaped from a minimum-security facility and assaulted a twelve year-old girl while he was out on that case. Ultimately, he was sentenced to forty years in prison, but in 1992, before the end of his prison term, the State moved to civilly commit him under the Psychopathic Personality Commitment Act (PP Act). MINN. STAT. §§ 526.09-10 (1992). In order to be committed under the PP Act, a person must evince an “utter lack of power to control his sexual impulses.” *Id.* The Minnesota Supreme Court held that an appellant could not be committed under the PP Act if the State failed to present “clear and convincing evidence that appellant has an utter lack of power to control his sexual impulses.” *Linehan IV*, 594 N.W.2d at 869 (quoting *In Re Linehan*, 518 N.W.2d 609, 614 (Minn. 1994) (*Linehan I*)). The amended PP Act was then revised into what is now known as the Sexual Psychopathic Personality Act (SPP Act). The SPP Act included among other factors, “an utter lack of power to control the person’s sexual impulses and, as a result, is dangerous to other persons.” Sexual Psychopathic Personality Act (SPP Act) of August 31, 1994, ch. 1, art. 1, 1995 Minn. Laws 5, 6 (codified as amended at MINN. STAT. § 253B.02, subd. 18b (1998)). Upon his release, the State legislature passed the SDP Act of August 31, 1994, ch. 1, art. 1, 1995 Minn. Laws 5, 7-8 (codified as amended at MINN. STAT. § 253B.02, subd. 18c (1998)). *Lineham IV*, 594 N.W.2d at 869. *See also* State *ex rel.* Pearson *v.* Probate Court of Ramsey County, 205 Minn. 545, 555 (1939), *aff’d*, 309 U.S. 270 (1940).

court held in an earlier decision, entitled, *In re Linehan (Linehan III)*,²⁵⁴ that an utter inability to control one's sexual impulses was not vital to narrowly fitting the State's Sexually Dangerous Persons Act (SDP Act) to meet substantive Due Process requirements, and that differentiating between sexual offenders with and without mental disorders did not violate equal protection.²⁵⁵ The appellant argued in this case that the Minnesota SDP Act does not limit the group of targeted offenders because it eliminates the need to prove that a person has an utter inability to control his sexual impulses before permitting civil commitment.²⁵⁶ Appellant raised the question of "whether *Hendricks* require[s] a complete or, at a minimum, a partial lack of volitional control over sexual impulses in order to narrowly tailor a civil commitment law to meet substantive Due Process standards and whether the SDP Act satisfies the substantive Due Process standards set out in *Hendricks*."²⁵⁷

The Minnesota Supreme Court cited *Hendricks*, where the United States Supreme Court limited "involuntary civil confinement to those who suffer from a volitional impairment rendering them dangerous beyond their control."²⁵⁸ The Minnesota Supreme Court concluded that the SDP Act was enacted to protect society from sex offenders with mental disorders "who retain *enough control*

254. 557 N.W.2d 171 (Minn. 1996).

255. *Linehan IV*, 594 N.W.2d at 870 (citing *Linehan III*, 557 N.W.2d at 182-87). The district court considered Linehan's current aggressive behavior, antisocial personality disorder, and his lack of control and sexual impulses to be risk factors in determining future sexual behavior. The defendant was ordered for commitment. *Id.*

256. *Id.* at 872. The SDP Act defines a sexually dangerous person as one who: 1) has engaged in a course of harmful sexual conduct; 2) has manifested a sexual, personality, or other mental disorder or dysfunction; and 3) as a result is likely to engage in acts of harmful sexual conduct. *Id.* at 874. Nowhere in the SDP Act did the legislature set forth the "utter inability test." However, the legislature stated that "it is not necessary to prove that the person has an inability to control his sexual impulses." *Id.* at 875 (citing MINN. STAT. § 253B.02, subd. 18c (a) (1998)).

257. *Id.* The Minnesota Supreme Court was concerned with the United States Supreme Court's definition of forcible civil detention in defined situations of "people who are unable to control their behavior and thereby pose a danger to the public health and safety." *Id.* (citing *Hendricks*, 521 U.S. at 357). The Minnesota Supreme Court pointed out that in *Hendricks*, the United States Supreme Court stated that a person may be civilly committed if he suffers from a mental abnormality or personality disorder "that makes it difficult, if not impossible, for the person to control his dangerous behavior." *Id.* at 873. The Minnesota Supreme Court indicated that this language in *Hendricks* "does not require an utter lack of control over harmful behavior, but rather a lack of adequate control over harmful behavior." *Id.* (citing *Hendricks*, 521 U.S. at 358).

258. *Linehan IV*, 594 N.W.2d at 873 (citing *Hendricks*, 521 U.S. at 358).

to ‘plan, wait, and delay the indulgence of their maladies until presented with a higher probability of success.’”²⁵⁹ The court held that the SDP Act permits the commitment of individuals who do not lack control over their harmful sexual impulses but have a degree of volitional impairment such that they are “unable to control their dangerousness.”²⁶⁰ The added requirement of being unable to control dangerousness is similar to the requirements set forth in *Hendricks*. The court only reviewed the specific issue of whether the appellant demonstrated a lack of adequate control over his sexually harmful behavior as the district court had taken into consideration all other commitment elements in *Linehan IV*.²⁶¹

In his dissent, Justice Page indicated that the fundamental issue before the court was whether it was in violation of a sexual predator’s Due Process rights if the State indefinitely confined them in a civil commitment facility under the Minnesota statute.²⁶² Justice Page pointed out that the majority determined that the only constitutional “check” on the State when dealing with the indefinite confinement of such individuals is a demonstration of their future dangerousness.²⁶³ Justice Page stated that the majority failed in

259. *Id.* at 875 (emphasis added) (citing *Linehan III*, 557 N.W.2d at 182 (quoting *In re Linehan*, 544 N.W.2d 308, 318 [hereinafter *Linehan II*])).

260. *Id.* (citing *Hendricks*, 521 U.S. at 358 and *Linehan III*, 557 N.W.2d at 182).

261. *Id.* at 876. The court referred to the district court’s findings in drawing the conclusion that appellant lacked adequate control over his sexual impulses and suffered from antisocial personality disorder and impulsivity. The court reviewed the case only under the analysis of whether the appellant demonstrated a lack of adequate control over his sexually harmful behavior and ultimately upheld appellant’s civil commitment under the SDP Act. *Id.* at 877-78.

262. *Linehan IV*, 594 N.W.2d at 878; MINN. STAT. § 253B.02, subd. 18c (1998). The question was specifically related to the concern for the rights of sexual predators who do not have a volitional impairment rendering them dangerous beyond their control. *Id.*

263. *Id.* Justice Page stated that the United States Constitution requires more than a mere consideration of a person’s future dangerousness. *Id.* In upholding the SDP Act, Justice Page stated that the court is simply acting as an arm of the legislature in violation of the court’s duty “to provide safeguards against the State’s improper use of civil commitment as a constitutionally invalid form of preventative detention.” *Id.* He continued that while the aim of the PP Act is to protect the public from sexually dangerous people who are unable to control their sexual behavior, the SDP Act is more far-reaching in that it is drafted to permit the indefinite commitment of both those individuals covered by the PP Act, and all other sexually dangerous people as well. *Id.* at 879. He asserted that under the SDP Act, no sexually dangerous person could be excluded. *Id.* Justice Page criticized the majority’s effort to say that the requirement of establishing that an individual has a “lack of adequate control” over his sexual behavior coupled with dangerousness provided the requisite constitutional safeguards for individuals. *Id.* at 880-81. Justice Page referred to the U.S. Supreme Court’s conclusion in *Hendricks* that the

its assessment of the mental illness prong of the SDP Act by not even considering that the mental illness or mental abnormality must cause the individual's inability to control their harmful sexual conduct, as stated in *Hendricks*.²⁶⁴

The majority's interpretation of the SDP Act would allow the State to lock up anyone whose mental abnormality makes them dangerous, whether or not they are dangerous beyond their control.²⁶⁵ Justice Page disagreed with the majority's broadening of "the class of persons eligible for confinement" by allowing civil commitment of individuals suffering from a mental illness or mental abnormality who are not dangerous beyond their control.²⁶⁶ Justice Page was dissatisfied with the majority's "lack of adequate control" standard because it failed to provide a definition of what "lack of adequate control" means.²⁶⁷ Justice Page stated that the court's "lack of control" standard does not answer the question of which offenders with a mental disorder are so volitionally impaired they cannot control their dangerousness.²⁶⁸ Justice Page argued that the

individual's mental illness or mental abnormality must make them unable to control their dangerousness before civil commitment can occur. *Id.* He pointed out that the Court treated "mental illness," "mental abnormality," and "inability to control" as synonymous with one another. *Id.* at 880.

264. *Id.* at 881.

265. *Id.*

266. *Id.* Justice Page stated the majority's requirement of "lack of adequate control" over their sexual behavior was ridiculous since all sex offenders appear to "lack adequate control." *Id.*

267. *Id.* Justice Page cites the majority's various phrases when referring to lack of control including: "some degree of volitional control," "a degree of volitional impairment," and "a lack of adequate control." Justice Page continued to cite the Supreme Court in *Hendricks*, stating that the State must prove that the "offender is unable to control his dangerousness." *Id.* Justice Page stated that the record indicated Linehan had control over his sexual behavior as his masturbation practices were described as both impulsive acts and also concealed misconduct. *Id.* at 883. In essence, Linehan may have had volitional impairment but not to the extent that he was dangerous beyond his control. *Id.*

268. *Linehan IV*, 594 N.W.2d at 881. Justice Page notes that traditionally courts have rejected a doctrine of diminished capacity because it "inevitably opens the door to variable or sliding scales of criminal responsibility, but the law recognizes no degree of sanity." *Id.* Justice Page stated:

Yet, while this court does not allow a defendant to use diminished capacity to avoid criminal responsibility, by its decision today it will allow the state to use diminished capacity's mirror opposite, 'lack of adequate control' to civilly commit an individual. If there is 'no twilight zone' between abnormality and insanity and an 'offender is wholly sane or wholly in sane,' then what does lack of adequate control mean?

Id. Justice Page believed that the majority's interpretation of the SDP Act would possibly allow the State to civilly detain any group of offenders who have a record

majority implicitly ruled that every individual who suffers from a mental illness or mental abnormality causing him a volitional impairment indicating future dangerousness is dangerous beyond control.²⁶⁹

Comparatively, in *In the Matter of the Commitment of W.Z.*,²⁷⁰ the Superior Court of New Jersey addressed the issue centering upon the differentiation of a sex offender who has volitional control problems, commits sex offenses, and recruits victims, and an offender “who is situational and opportunistic but not selective to a particular type of victim.”²⁷¹ In this case, the appellant argued that civil detainment must be limited to offenders who completely lack volitional control of their violent sexual impulses.²⁷²

In this case, Dr. Kenneth McNiel at the Adult Diagnostic

of harmful and dangerous behavior, suffer from some kind of mental illness, and who will likely be dangerous in the future. *Id.* at 881. To illustrate his point, Justice Page hypothesized that a youth who has Conduct Disorder, and is sexually dangerous when young is likely to develop Antisocial Personality Disorder as an adult, which would result in “a pervasive pattern” of the “violation of the rights of others” and the youth could therefore be civilly detained under the majority’s interpretation of the SDP Act because he would be likely to engage in dangerous conduct in the future. *Id.*

269. *Id.* at 882. Justice Page argued that the SDP Act specifically states that an offender’s inability to control his sexual impulses is not the issue, rather, the State must prove that the defendant “lacks adequate control” without providing for a specific definition of lack of control. *Id.* at 884. Justice Page argued that the Act was unconstitutional because the State does not have to prove that the person to be detained “has an inability to control their sexual impulses,” rather, the Act is applicable to all offenders despite their ability to control their dangerous sexual offending patterns. *Id.* at 885.

270. 773 A.2d 97 (N. J. Super. Ct. App. Div. 2001).

271. *Id.* at 103-04. This case was an appeal from a judgment rendered under the New Jersey Sexually Violent Predator Act (SVPA), sections 30:4-27.24 to 27.38 of the New Jersey Statutes, under which W.Z. was committed to the special offenders unit at the Northern Regional Unit (NRU) in Kearny, New Jersey. *Id.* at 100. The judge found that W.Z. was a threat to society as a result of his mental abnormality, which indicated a risk to commit future sex offenses. *Id.* The SVPA can be employed with sex offenders who have volitional control of their sexual impulses, but do not have the emotional capacity to control their sexual dangerousness. *Id.*

272. *Id.* W.Z. was sentenced to eighteen months in prison for fourth degree sexual contact, then five years for making terroristic threats, and an additional five years for aggravated assault. He served his maximum sentence and was temporarily committed to Northern Regional Unit (NRU). *Id.* at 101. He had an extensive juvenile and adult criminal history, including attempted sexual assault and criminal sexual contact as an adult. *Id.* His first sexual offense occurred when he was sixteen years of age, while his second sexual offense occurred when he was about twenty-three years of age when he physically and sexually assaulted the victim. *Id.* Most recently, he was convicted of sexually assaulting a woman at a train station. He had a total of fifteen institutional disciplinary charges during his five-year prison term including some assaults and segregation. *Id.*

Treatment Center in Avenel diagnosed W.Z. with “antisocial personality disorder with narcissistic features,” violence, potential anger towards women, and a “lack of empathy for others.”²⁷³ Three other mental health professionals diagnosed him with antisocial personality disorder.²⁷⁴ Dr. Jackson Bosley testified that the defendant was not suffering from a paraphilia or sexual compulsion, and that he had made a conscious decision to sexually assault his victims, although he did not have the ability to control his antisocial behavior and posed a continued risk to women.²⁷⁵ Dr. Anthony D’Urso testified that the central issue focused on making a distinction between a sex offender who has an impulse to sexually offend and seeks out victims and a sex offender who is situational and opportunistic but does not actively select a particular type of victim.²⁷⁶ Dr. D’Urso testified that the latter type of offender typically does not engage in more frequent sexually violent offenses than any other sorts of crimes.²⁷⁷

Judge Freedman indicated that based on the evidence, it was clear that W.Z. had a mental abnormality that does affect his emotional capacity so as to predispose him to commit acts of sexual violence, despite the unanimous testimony of three mental health experts who said he could control his sexual acts.²⁷⁸ The judge concluded that W.Z. had committed a sex crime, suffered from a

273. *Id.* at 102. Dr. McNeil indicated that the etiological factors leading to the commission of the offense included antisocial personality, violence and impulsivity rather than being based on sexual compulsions. *Id.* W.Z. did not engage in repetitive and compulsive sexual behavior and Dr. McNeil concluded that he was not eligible for sentencing under the SVPA. *Id.*

274. *Id.*

275. *Id.*

276. *In re W.Z.*, 773 A.2d at 103-04.

277. *Id.* W.Z. argued that he did not suffer from a sexual compulsion and lacks a deviant sexual arousal pattern, but because he had control over his behavior, he did not qualify under the SVPA. *Id.* at 104. No evidence was presented that he suffered from a paraphilia, and he argued under the United States Constitution, in order to be civilly detained as a sex offender, the State must prove the offender was not able to control his sexually dangerous behavior. *Id.* The court rejected this argument, and the judge argued that the SVPA is limited to individuals who cannot control their sexual impulsivity and/or compulsions. *Id.* Dr. D’Urso stated that W.Z. was antisocial but did not have obsessive and compulsive sexual thoughts, nor did he suffer from any particular thought disorder that would prevent him from controlling his impulses. *Id.* at 103. He had a personality disorder but that disorder is not the same type of volitional behavior that mood or psychotic disorders represent. *Id.* Dr. D’Urso distinguished antisocial personality from mental incapacity as descriptive of the way a person acts in society as opposed to a biochemical disorder. *Id.*

278. *Id.* at 104.

mental or personality disorder and was likely to sexually re-offend in the future.²⁷⁹

W.Z. argued that the Constitution requires that a sex offender must suffer from a volitional problem in which he is unable to control his sexual behavior in order to qualify under the SVPA.²⁸⁰ W.Z. contended that he was not subject to commitment under the SVPA based on the expert testimony at his initial commitment hearing because he did in fact have control over his sexual impulses.²⁸¹

The State considered the language of the SVPA allowing for the commitment of a sexual predator even if he does not suffer from a complete lack of volitional control. The State argued that *Hendricks* did not require a complete lack of volitional control and that the SVPA follows the reasoning in *Hendricks*.²⁸² The SVPA provides that the courts consider the risk of an individual to commit sex crimes in the future and do not formally consider whether the violence is caused by emotional or volitional impairments.²⁸³ All of the experts were in agreement that if he desired, W.Z. had the volitional capacity to control his sexual impulses, but that he chose not to control those urges.²⁸⁴

The only question before the court in *In re W.Z.* was whether the State was prohibited from involuntarily committing a sex offender who could control his acts, but chooses not to.²⁸⁵ The Superior Court of New Jersey found the language in *Hendricks* to be mildly confusing due to the case's implication that the mental abnormality component was specifically limited to volitional impairment.²⁸⁶ The court did not agree with W.Z.'s argument that according to *Hendricks*, involuntary commitment must be limited to those individuals who lack control over their actions and who are pre-

279. *Id.*

280. *Id.*

281. *Id.*

282. *Id.* at 105.

283. *Id.*; N.J. STAT. § 2C:47-3(b) (2002) (requiring a finding of "repetitive and compulsive behavior"). "The absence of such language in the SVPA evinces the legislature's intent that commitment for control, care and treatment under the SVPA not necessarily be conditioned exclusively upon a finding of compulsive behavior." *In re W.Z.*, 773 A.2d at 105.

284. *In re W.Z.*, 773 A.2d at 105.

285. *Id.*

286. *Id.* at 106. The court concluded that "plainly" the Court had not intended to limit the application of the statute to only those with a volitional impairment because the language of the statute itself defined mental incapacity to include either volitional or emotional capacity. *Id.*

dicted to be sexually dangerous in the future.²⁸⁷ The court did not believe the Supreme Court had implied that an offender with an emotional disorder that makes him likely to commit future sex acts is not subject to commitment.²⁸⁸ The court concluded that the Supreme Court specifically held that Due Process is not violated when the definition of mental abnormality includes either emotional or volitional impairment.²⁸⁹

Further, the court opined that *Hendricks* requires that an offender subject to detainment be unable to control his dangerousness; however, lack of volitional control is not the only possible cause of future dangerous sexual behavior.²⁹⁰ The court argued that a person with a volitional disorder might suffer from a sexual compulsion that limits his ability to control his behavior. A person with an emotional disorder might experience anger or cruelty when he cannot control his actions. A person with a cognitive impairment might suffer from hallucinations or delusions and not be able to control his behavior. Any, or all, of these disorders might lead to sexual offending.²⁹¹ The court reasoned that although the SVPA includes impaired cognitive ability as a condition, which may be a causative factor in a person's predisposition to sexual violence, that factor does not alter the scope of the statute in which the legislature has discretion in defining mental abnormality to include emotional capacity.²⁹²

The result of the legislature's identification of both emotional and volitional capacity in the definition of mental abnormality was to include not only an inability to control behavior, but also "negative behavior."²⁹³ The court reasoned that "neither volitional capacity nor emotional capacity has any talismanic significance but rather lies within the discretion afforded a state legislature to de-

287. *Id.* at 107.

288. *Id.* (quoting *Kansas v. Hendricks*, 521 U.S. 346, 360 (1997)).

289. *Id.* The court also concluded that the Supreme Court would uphold a state SVP statute if it relies on conditions of detainment upon the State proving the defendant's mental abnormality that results in "an inability to control sexually dangerous behavior." *Id.*

290. *Id.* Under the SVPA, a person may be deemed to have a mental abnormality that results in his inability to control his dangerousness in one of three different ways: an emotional impairment, a cognitive impairment, or a volitional impairment. *Id.* (citing N. J. STAT. § 30:4-27.26 (2002)).

291. *Id.* Like the Kansas Act, the SVPA defines mental abnormality as a condition affecting a person's emotional or volitional capacity in a manner that predisposes him to sexual violence. *Id.*

292. *Id.*

293. *Id.* at 108-09.

fine mental health terms.”²⁹⁴ W.Z. argued that “failure to limit commitments to only those who suffer from a lack of volition would require the statute to be voided for over-breadth.”²⁹⁵ The court concluded that the SVPA is not overbroad because it is applicable only to sex offenders who have been convicted and have suffered from a mental abnormality or personality disorder which increases their risk of re-offending in the future.²⁹⁶

Next, in *In re Leon G.*,²⁹⁷ Leon pled guilty to five counts of child molestation and one count of sexual abuse and was sentenced to a twelve-year prison term in the State of Arizona.²⁹⁸ Leon was screened to determine his sex offender status (sexual violent predator). The evaluating psychologist, Dr. Barry Morenz, believed that Leon suffered from a sexual deviance that predisposed him to commit future sexually violent acts.²⁹⁹ The Arizona Act defines “mental disorder” as a “paraphilia, personality disorder, or conduct disorder or any combination [thereof] . . . that predisposes a person to commit sexual acts,” rendering the individual sexually dangerous.³⁰⁰ Dr. Morenz did not testify that Leon suffered a volitional

294. *Id.* at 109 (citing *Hendricks*, 521 U.S. at 359).

295. *Id.* at 110.

296. *Id.* The statute’s inclusion of emotional and cognitive deficits in the definition of mental abnormality does not indicate that the statute is vague or overbroad. *Id.* The court determined that if a person is “likely to engage in acts of sexual violence,” the State must prove by clear and convincing evidence, that the defendant shows a “propensity, inclination or tendency, to commit acts of sexual violence and must establish, by clear and convincing evidence, the degree of such a propensity.” *Id.* The court recognized difficulties regarding the establishment of a standard for detainment based on dangerousness because dangerousness is hard to define, and is often vague in nature and stated that courts will need to evaluate both the likelihood of conduct and the magnitude of W.Z.’s harm in order to determine whether commitment is appropriate. *Id.* at 111. W.Z. also argued that the SVPA is impermissibly vague and ambiguous and argued that the terms “likely,” “propensity,” and “threat” are undefined, but the court rejected that argument. *Id.* at 113.

297. 18 P.3d 169 (Ariz. Ct. App. 2001).

298. *Id.* at 171.

299. *Id.* The jury found that Leon was a sexually violent predator. *Id.* Dr. Morenz testified that Leon might commit future sexual acts in part based on a prior sex offense. *Id.* at 172. Leon argued that his initial screening was defective because he did not have counsel present, the State improperly presented evidence of a prior sex offense, and the detainment under the civil commitment law invalidated his 1982 plea agreement because the possibility of civil commitment did not exist at the time he entered his plea (Ex Post Facto argument). *Id.* The court overruled all of these arguments. *Id.* at 172-73.

300. *Id.* at 174 (citing ARIZ. REV. STAT. § 36-3701(5) (Supp. 2000)). The Arizona Act associates a present mental disorder with future sexual dangerousness and nothing more is required to commit someone. The issue of volitional control

impairment, but rather that he had a “cognitive distortion” and had some “cognitive illusions” about his behavior, but that he was able to control his behavior.³⁰¹

The court attempted to “read into” the Act the missing component of volition; however, there was concern about changing the law’s objective since that would violate the separation of powers principle and intrude upon the legislature’s specified role.³⁰² After a thorough review, the court could not find any language in the Act suggesting a volitional impairment requirement and, consequently, held that because this requirement was lacking and had essentially been mandated by *Hendricks*, the law was unconstitutional.³⁰³ In *Glick v. Arizona*,³⁰⁴ the United States Supreme Court vacated the judgment and remanded the case to the Supreme Court of Arizona for reconsideration in light of *Crane*. As of the date of the submission of this article for publication, the Arizona Supreme Court had not yet issued a new opinion on this matter.

IX. DEBATE BETWEEN COMMUNITY SAFETY AND CIVIL LIBERTIES

In his article *Fear of Danger, Flight From Culpability*, Stephen J. Morse argued against the increasing social and constitutional acceptance of pure preventive detainment of sexually dangerous individuals.³⁰⁵ He argued that after *Hendricks*, any convicted criminal may be found mentally abnormal and civilly committed after release from prison.³⁰⁶ The traditional distinction between criminal and civil confinement, based on both responsibility and non-responsibility, protects the civil rights and freedom of individuals. However, cases like *Hendricks*, decided with public safety in mind, have clouded the distinction.³⁰⁷ Morse reasons that the Court went too far to protect the public, violating individual rights of liberty and justice and suggesting that societal safety is not worth the po-

or impairment is neither mentioned nor implied. The Act did not impose the requirement of a loss of control.

301. *Id.* at 175 n.4.

302. *Id.*

303. *Id.*

304. *In re Leon G.*, 18 P.3d 169, vacated by sub nom. *Glick v. Arizona*, 535 U.S. 982 (2002).

305. See Morse, *supra* note 27, at 250. Stephen J. Morse is a law professor at the University of Pennsylvania Law School. For a full discussion and argument about volitional problems, see Stephen J. Morse, *Culpability and Control*, 142 U. PA. L. REV. 1587 (1994).

306. Morse, *supra* note 27, at 250.

307. *Id.*

tential costs of civil rights.³⁰⁸

In addition, Morse argued that Leroy Hendricks was fully responsible for his crimes, even though his behavior indicated a mental disorder.³⁰⁹ Moreover, he contended that Hendricks was thinking clearly and knew the difference between moral right and wrong.³¹⁰ Morse argued that when Hendricks had completed the sentence for his latest offense he still presented a risk to re-offend, yet he did not qualify for traditional civil detainment for mentally ill people.³¹¹ He cited *Foucha*, in which the Supreme Court held that the continued involuntary detainment of an insanity acquittee no longer suffering from a mental disorder violates his individual rights, even if the defendant cannot prove that he does not present a future risk of harm to himself or others.³¹²

Morse argued that the Kansas Act tried to fit Hendricks into a gap between civil and criminal law, because he did not specifically fall into either arena.³¹³ However, Kansas attempted to bring the statute within the civil commitment, non-punitive arena, explaining that sexual violent predators were not responsible for their dangerous acts.³¹⁴ Kansas' use of mental abnormality criteria created a non-responsibility justification problem.³¹⁵ As such, Morse argued that the statute was confusing because under the statute, a sexually violent predator may be culpable enough to deserve the stigma and punishment of criminal punishment, yet not responsible enough to be granted the liberty from involuntary civil confinement that even very predictable, high risk, and dangerous but responsible individuals retain.³¹⁶ He contended that "[o]ur society must decide whether sexually violent predators are mad or bad and respond ac-

308. *Id.* at 251.

309. *Id.* at 258.

310. *Id.*

311. *Id.* Morse believed that not all mental disorders negate responsibility and though Hendricks had a major mental illness, he lacked psychotic features, could think clearly, and could make decisions about his treatment. *Id.*

312. *Id.* at 256 (citing *Foucha v. Louisiana*, 504 U.S. 71 (1992) (stating that the State cannot civilly commit responsible defendants due to dangerousness alone, even if a defendant is still suffering from an antisocial personality disorder and has a dangerous or violent background)).

313. *Id.* at 258. Many argue that individuals, like Hendricks, know exactly what they are doing and lack some control problems, yet should be held accountable and responsible unlike traditional civilly committed individuals such as insanity acquittees. *Id.*

314. *Id.*

315. *Id.*

316. *Id.*

cordingly.”³¹⁷

As a result of *Hendricks*, Morse claimed that society has gained public safety but the civil rights of innocent and responsible individuals are threatened.³¹⁸ He opined that the *Hendricks* decision commingles and confuses culpability and non-responsibility as prerequisites for detainment and threatens pure preventive detention.³¹⁹ He maintained that the Kansas Act’s definition of a mental abnormality was vague and incomplete regarding its association with future sexual dangerousness.³²⁰ Morse stated that the statute’s definition of a mental abnormality—“congenital or acquired condition affecting the emotional and volitional capacity which predisposes the person to commit sexually violent offenses in a degree constituting such a person a menace to the health and safety of others”—is nothing more than a way to describe behavior and its etiology.³²¹

Morse debated whether there was any good reason to believe that sexually violent predators specifically are unable to control their behaviors in contrast to other offenders.³²² He also questioned why sexual desires are more compelling, intense, and serious than other similarly strong desires.³²³ Volitional problems are not well understood.³²⁴ A personality disorder is a diagnostic category, and individuals who suffer from these disorders usually are not psychotic and are responsible for their actions.³²⁵ All behavior stems from genetic or acquired factors that affect character or volitional predispositions.³²⁶ The potency of some sex offenders’ sexual drives makes it difficult for them to assess the likelihood of being caught, yet this does not differentiate these offenders from other types of impulsive criminals and “impulsivity does not warrant an irrationality excuse.”³²⁷

317. *Id.* at 259 (stating that if a defendant is morally responsible, he should not be civilly detained).

318. *Id.*

319. *Id.*

320. *Id.* at 260.

321. *Id.* Morse stated, “[n]othing else in the definition differentiates the sexual predator from *any* other person.” *Id.* at 261 (emphasis added).

322. *Id.*

323. *Id.* at 262 (Morse compared the deviant desires of sex offenders to the desires of greed of property offenders).

324. *Id.*

325. *Id.* (stating that mental abnormality is not a recognized diagnostic category, rather it is a legal term).

326. *Id.*

327. *Id.* at 262.

In addition, there is a question of whether the volitional impairment of a repeat, assaultive, violent offender, who may have an antisocial personality disorder or severe impulse control disorder, should be civilly committed to protect the public. These offenders could be classified similarly to pedophiles who are volitionally impaired, rather than cognitively impaired individuals such as traditional insanity acquittees. Could other volitionally impaired criminals be treated like violent sexual predators? As in *Crane*, are there some sex offenders who are not volitionally impaired, having some ability to control their offending behaviors and being less dangerous, while other sex offenders are more volitionally impaired and at higher risk to sexually offend? Are volitionally impaired offenders with pedophilia higher risk sex offenders than antisocial rapists who can control their offending behaviors, but simply choose not to?

Further, Morse opined that sex offenders pay for their crimes in prison and once released should not be civilly detained.³²⁸ Although some high-risk offenders will be released, this is a consequence of the justice system under a notion of liberty and courts should initially give longer sentences to sex offenders.³²⁹ The holding in *Hendricks* presents a danger that not only violates traditional liberty rights, but also threatens all defendants to face civil commitment.³³⁰

Morse also questioned whether the Court's definition of mental abnormality empowers the State to confine culpable defendants to indefinite, preventive detainment in order to protect society.³³¹ According to *Hendricks*, a state legislature may define mental abnormality as it sees fit, including finding that such mentally abnormal people are unable to control their actions.³³² One of the problems in *Hendricks* is the Court's interpretation of the definition of mental abnormality. It cannot be logically limited to sexually violent predators; rather, the definition is too vague and broad and can be applied to any criminal act.³³³

328. *Id.* at 264.

329. *Id.*

330. *Id.*

331. *Id.*

332. *Id.*

333. *Id.*

X. RECOMMENDATIONS

States should have the autonomy to initiate legislation regarding the civil commitment of violent sexual predators. The substantive Due Process argument prevents the government from violating individual rights, especially freedom and liberty rights.³³⁴ When discussing the legitimacy of various forms of civil commitment, two structural components of American government arise.³³⁵ The first component is federalism, when the United States Supreme Court interprets laws by the states.³³⁶ Federalism is based on the Constitution and separation of powers between the states and the federal government.³³⁷ There is often conflict and confusion regarding the relationship between the states and the federal government.³³⁸ The second structural issue is the separation of powers reflecting governmental powers divided not only between the national government and the states, but also among the three branches of government.³³⁹

Initially, the Kansas Sexually Violent Predator Act was a state legislative issue, but when it was reviewed by the Supreme Court, federalism was at issue.³⁴⁰ One fundamental issue in *Hendricks* was what governmental entity should decide the appropriate grounds for involuntary civil detainment of sex offenders.³⁴¹ Is the United States Supreme Court in a better or more qualified position than a state legislature to determine whether a civil commitment law is appropriate in these states?³⁴² State legislatures have the advantage of gaining information from lobbyist groups and constituents who provide them with facts and figures reflecting their concerns.³⁴³ State legislatures reflect the attitudes of their constituents, whereas the courts lack this information.³⁴⁴

When discussing federalism, there appears to be a more active role by the states, their representatives, democratic institutions, and

334. See McAllister, *supra* note 59, at 269.

335. *Id.* at 269-70.

336. *Id.* at 270.

337. *Id.*

338. *Id.*

339. *Id.*

340. *Id.*

341. *Id.*

342. *Id.*

343. *Id.* at 270-71.

344. *Id.* at 271.

law making bodies than the court systems.³⁴⁵ However, this power among the states does not give them uncontrollable discretion when implementing laws such as these.³⁴⁶ Many argue that the states should be prevented from labeling specific groups of individuals as mentally ill and detaining them indefinitely.³⁴⁷ When considering civil commitment laws, state legislation should take into consideration sound medical and scientific research but bear in mind societal values, attitudes, and norms.³⁴⁸

Both the majority and dissenting opinions of the Supreme Court in *Hendricks* respected judicial veneration to the states' legislative objectives regarding civil commitment of sex offenders and the definitions of mental disorders and sex offender treatment.³⁴⁹ In contrast, most courts will give respect to state legislative projects rather than judicially intervening, especially when these statutes involve mental health professionals, assessment and treatment of the mentally ill, and dangerousness.³⁵⁰

The issues of mental health, mental abnormality, dangerousness, and civil commitment are not clear-cut and the states should have the right to choose legislative procedures as long as they are in line with the United States Constitution. The United States Supreme Court's role is to interpret laws and determine if certain laws adhere to the Constitution. Once the United States Supreme Court makes such a decision to determine the constitutionality of certain legal issues, the states should have the power to determine what laws they wish to initiate or enact.

States, with respect to the principles of federalism, should have the autonomy to initiate involuntary civil commitment legislation for sexually violent predators. Simply put, citizens elect state legislators and the citizens' attitudes affect the decisions of the legislature.³⁵¹ Through democratic principles, the citizens should have

345. *Id.* at 271-72. See also 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 (1999). In his note, Adam Falk stated his belief that the *Hendricks* decision does not limit the scope of a state's power to indefinitely detain offenders. A state could link driving under the influence or under-age drinking to alcohol-use disorders or, similarly, drug crimes to cocaine dependency disorders. *Id.* at 120. A state could conceivably civilly commit all persons convicted of all drug or alcohol related crimes. *Id.*

346. McAllister, *supra* note 59, at 272.

347. *Id.*

348. *Id.*

349. *Id.* at 291.

350. See *id.*

351. See *id.* at 271.

the right to vote for or against laws that involve civil commitment of sexually violent persons. The states that do initiate such legislation should keep in mind that the imposition of harsher sentencing guidelines, such as substitution of consecutive criminal sentencing guidelines rather than concurrent sentencing guidelines, may eliminate the civil commitment debate.

Also, the development of comprehensive sex offender treatment programs and further research regarding future sex offending recidivism after treatment to measure the efficacy of treatment is suggested. Providing comprehensive sex offender treatment for defendants in prison, prior to release into the community, may conserve state resources, protect defendants' civil liberties, and possibly negate debates surrounding civil commitment while protecting society from the risk of future harm.

XI. CONCLUSION

Traditionally, the United States Supreme Court has taken a strong stance in protecting community safety by attempting to prevent future sexually violent offenses. This has consistently raised the question of whether this effort has been done while sacrificing individuals' civil liberties. In *Hendricks*, the Court stated that a sexually violent predator statute did not violate the Double Jeopardy Clause of the United States Constitution's Fifth Amendment, the United States Constitution's prohibition against Ex Post Facto laws, or a defendant's substantive Due Process rights.³⁵² The Court also addressed the issues of future dangerousness, mental abnormality, and mental illness.³⁵³

The Court declined to adopt a specific definition of the concept of mental illness or mental abnormality and held that the Kansas Act's mental abnormality provision did not require proof of mental illness enough to justify civil detainment.³⁵⁴ The majority and dissenting opinions acknowledged that the issue of how to decide what level of mental illness is required to qualify for civil commitment is challenging if not impossible.³⁵⁵ Both opinions point out that there is no consensus among mental health professionals on this important question of mental illness or mental ab-

352. *Kansas v. Hendricks*, 521 U.S. 346, 350 (1997).

353. *Id.*

354. *See McAllister*, *supra* note 59, at 269.

355. *See id.*

normality.³⁵⁶

The Court agreed with the trial and appeals courts in *Kansas v. Hendricks*³⁵⁷ in that pedophilia appears to qualify as a mental abnormality under the Kansas Sexually Violent Predator Act.³⁵⁸ The Court posited that Hendricks' mental health issues fit under the mental abnormality clause within the Kansas Sexually Violent Predator Act.³⁵⁹ This decision provides a broad-based definition of mental abnormality and volitional impairment. In addition, it is different from traditional civil commitment mental abnormality definitions such as insanity, involving primarily cognitive impairments.

The Court recently upheld a civil commitment scheme similar to that in *Hendricks* when it held in *Seling v. Young* that the Washington Act was civil in nature, and did not violate the defendant's Double Jeopardy or Ex Post Facto claims.³⁶⁰ The Act was determined to be civil in nature and not punitive as long as it provides sexually violent predators with adequate care, and individualized treatment in a civil and non-prison institutional setting.³⁶¹ The Court opined that the Act must consider the Due Process requirements that the conditions and duration of confinement bear some reasonable relation to the purpose for which the sex offenders are civilly detained.

Traditionally, mental abnormality and mental health issues in civil commitment proceedings have involved psychotic disorders, primarily schizophrenia, which classify an individual dangerous due to his mental condition. In essence, civil commitment statutes have incorporated dangerousness and mentally ill criteria as well as non-responsibility issues. Historically, an individual could not be sent to

356. *See id.*

357. *State v. Hendricks*, 912 P.2d 129 (Kan. 1996).

358. *Hendricks*, 521 U.S. at 355-56, 360.

359. *Id.*

360. *Seling v. Young*, 531 U.S. 250, 267 (2001).

361. *Id.* at 265 (citing WASH. REV. CODE § 71.09.080(2) (1992 and Supp. 2000)). According to the Act, when the defendant is found to be civilly committed as a sex offender, he should be committed for control, treatment, and care in the custody of the department of social and health services. Once committed and detained, he has the right to treatment. He is entitled to an annual examination of his mental condition and if that evaluation indicates that his condition is changed to the degree that he is not likely to sexually re-offend, then state officials must authorize a petition to the court for conditional release. The State must prove beyond a reasonable doubt that he is not safe, is sexually dangerous and will likely commit future sex offenses. The defendant may also seek to petition the court for release. *Id.* at 253-56.

prison in a punitive fashion if he did not appreciate the wrongfulness (cognitive prong) of the crime at the time of the act, or in some jurisdictions, was unable to conform his acts to the law or refrain from acting (volitional prong) due to his mental illness. In either case, the offender would have been found not legally responsible for his offense. Conventionally, the defendant then would have been confined to a secure but less punitive treatment setting.³⁶² A defendant could also be sent to a mental hospital if he

362. In the United States, there are different standards for the Not Guilty By Reason of Insanity Defense. The insanity standards commonly used in the United States are as follows: The M’Naghten standard provides that for an individual to be found NGRI, he/she must be “laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or if he knew it, that he did not know he was doing what was wrong.” Another standard, the M’Naghten irresistible impulse standard, indicates that in addition to the M’Naghten rule, a defendant is not responsible for his criminal offenses when:

- 1) if, by reason of the duress of such mental disease, he had so far lost the power to choose between the right and wrong, and to avoid doing the act in question, as that his free agency was at the time destroyed; 2) and if at the time, the alleged crime was so connected with much mental disease, in the relation of cause and effect, as to have caused the product of it solely.

To prove an irresistible impulse defense, the issue of volitional-behavioral impairment is crucial. The loss of power to choose must be the result of a mental illness rather than a strong emotional response in order to satisfy the irresistible impulse standard. A rage-induced emotional outburst would not satisfy this test. The “power to choose” must be assessed by whether the defendant has a desire to resist the emotional act and whether he has the capacity to resist it. This loss of power to choose “must reflect some internal imperative to carry out behavior that is forbidden both on a societal and a personal basis.” This internal impairment may be due to a compulsion such as repetitive behaviors he is unable to resist. The “loss of power” to not commit the criminal act involves the inability to control the behavior, which can be communicated through the irresistible impulse standard: “acts beyond his control,” being “overwhelmed,” and “unable to control his actions and impulses.” Another standard, the Durham standard, commonly referred to as the “product rule,” states that, “an accused is not criminally responsible if his unlawful act was a product of a mental disease or defect.” A defect is a mental condition that most likely will not be improved and is due to a mental and or physical disease. Another standard, the American Law Institute (ALI) standard, states that a defendant is not responsible for his criminal acts if “as a result of a mental disease or defect, he lacks substantial capacity either to appreciate the criminality (wrongfulness) of his conduct or to conform his conduct to the requirements of the law.” The phrase “conformity of conduct” represents the volitional/behavioral prong of the ALI standard. The term replaced the earlier irresistible impulse and refers to any significant deficit “in self-determined purposive behavior at the time of the offense. Conformity of conduct addresses the defendant’s ability to choose and to withhold important behavior preceding and including the crime in question.” An individual often loses both cognitive and volitional control. It should be noted, the author gives an example that ritualistic behavior may or may not be symptomatic of mental illness and should be carefully evalu-

were assessed to be not competent to stand trial and would be treated. An attempt would be made to restore the person's competency to stand trial. The defendant can only be civilly committed for a reasonable length of time to assess their competency. In many states, defendants are committed for competency related issues for a certain amount of time based on the severity of the felony or misdemeanor. In cases in which the defendant is found to be not guilty by reason of insanity or not competent to stand trial, there is usually no question of severe mental illness.

Among the questions in *Hendricks* were whether the defendant suffered from a mental illness, what kind, and the severity of mental illness. It was established that Hendricks was sane and could appreciate right from wrong, but appeared to lack volitional control. The Court reasoned that his sexual behavior was caused by a volitional impairment causing an inability to control his acts and qualified this as a mental abnormality.³⁶³ As previously noted, some states have included a volitional component in their civil commitment statutes for the criminally insane. The Court reasoned that if he was volitionally impaired, mentally ill based on a diagnosis of pedophilia, and was dangerous based on criminal history and prior sex offense convictions and admittance to uncontrollable urges, he could be civilly committed.³⁶⁴

ated for its relevance to volitional abilities. For example, "some defendants with sexual paraphilias may intentionally use ritualistic behavior to heighten their sexual pleasure; these behaviors (dependent, of course, on the impairment) are unlikely to represent uncontrollable behavior." The Insanity Defense Reform Act (IRDA) was passed in 1984, after John Hinckley pled not guilty by reason of insanity for attempted murder of former President Reagan, which caused a public outcry and led to legislative reform. Procedurally,

the act places the burden on the defendant to prove, by clear and convincing evidence that he/she meets the substantive elements of the test. The test includes that at the time of the commission of the offense, the defendant, as the result of severe mental disease or defect, was unable to appreciate the nature and quality or the wrongfulness of his acts. Mental disease or defect does not otherwise constitute a defense.

RICHARD ROGERS & DANIEL W. SHUMAN, CONDUCTING INSANITY EVALUATIONS (2d ed. 2000) 14, 71, 73-75, 79-81.

363. *Hendricks*, 521 U.S. at 360.

364. *Id.* Both pedophilia and, the less common, sexual sadism are paraphilias. Paraphilias are a general classification for recurrent, intense sexual urges, fantasies, or behaviors that involve unusual objects, activities, or situations that cause clinically significant distress or impairment in social, occupational, or other important areas of functioning. An affinity to commit rape could be classified as a paraphilia not otherwise specified (not fitting into a specific paraphilia category). DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS, 493 (4th ed. 1994)

More recent court cases, such as *Crane*, *Linehan*, and *Commitment of W.Z.*, have addressed the complex issue of avolitional versus volitional impairments. In *Crane*, the Court held that the Kansas Act was satisfied by emotional or personality disorders leading to sexually violent behavior and did not require a component of the lack of volitional control. This is a crucial holding because it opens the door to complicated analyses based on a wide range and scope of personality disorders, including primarily antisocial personality disorder and the clinical construct of psychopathy.

Civil commitment statutes for sex offenders usually require that the person have a mental illness or disability that causes them to be more likely to engage in future sexually violent acts and that treatment is necessary to reduce their risk to sexually re-offend. These statutes may be applied to a wide array of sex offenders. For example, some sex offenders are pedophiles who suffer from a volitional impairment, similar to irresistible impulse in insanity acquittees. In essence, they may lack the ability to exercise making choices, and this inability leaves them unable to control their behavior. Some may argue that a defendant suffering from Bipolar Disorder, suffering from mania and high energy and possible psychotic features, may be more likely to act out aggressively and commit an assault while still understanding right from wrong. The explanation for this behavior is that this high energy is triggered by a chemical imbalance and may be accompanied by psychotic features such as delusions, but the defendant might still be aware of right and wrong. In some states, such an offender could be found insane and civilly committed based on an inability to control his conduct.

Similarly, some professionals argue that pedophiles should be civilly committed. A pedophile could have a sexually deviant arousal system, a possible biochemical disorder. Although the person understands that it is wrong to sexually assault a young boy, that person may lack the ability to conform his behavior to the rules of law. Why could he not be deemed insane in line with some states' insanity statutes that include irresistible impulses or failure to conform behavior to the requirements of the law?

Contrarily, other types of sex offenders may suffer from an avolitional impairment, such as antisocial personality disorder or psychopathy.³⁶⁵ These offender types have an ability to make

(DSM-IV).

365. Psychopathy is the disorder of a criminal personality that combines affec-

choices, but consciously choose to act in antisocial ways and violate the laws and rights of other people. An example of this type of offender is a male who has a prior juvenile and adult criminal record, and commits a violent rape during a burglary of a house, indicating more of an opportunistic crime. Unless he has a pattern of this type of behavior and qualifies as a serial rapist, this individual presents as a much different type of sex offender than the average pedophile. It is conceded that both types of offenders are viewed as dangers to society. This comparison begs the question: which offender poses a higher risk for sex offending in the future and should they be treated differently?

Some research in the field of sex offending indicates that the two factors most highly correlated with sex offending are psychopathy and sexual deviancy (paraphilias).³⁶⁶ For example, sexual sadist psychopaths are perhaps the most dangerous sex offender, as they typically have a combination of both volitional and avolitional impairments due to their sexual deviancy and psychopathic traits. Psychopathic pedophiles are equally as dangerous as both groups usually display a pattern of violent sexual assaults with numerous victims. Should these types of offender have a longer commitment status than an individual who only has either an avolitional or a volitional impairment? Those types of psychopathic offenders are often times not amenable to treatment. Who should have the longer term of commitment, the individual with a volitional impairment or the individual with the avolitional impairment?³⁶⁷

tive or emotional components such a lack of conscience, guilt, remorse, and a criminal behavioral lifestyle. Most psychopaths who are incarcerated have antisocial personality disorder; not all antisocial personality individuals are psychopaths. There is a general belief that psychopaths comprise a small amount of the criminal population who commit a substantial proportion of serious and violent offenses.

366. See R. Karl Hanson & Monique T. Bussiere, *Predicting Relapse: A Meta-Analysis of Sexual Offender Recidivism Studies*, 66 J. CONSULTING & CLINICAL PSYCHOL., 348, 348-62 (1998).

367. Dennis Doren, clinical/forensic psychologist and a national expert on sexual offending, particularly on risk assessments and actuarial risk prediction, is one of many clinicians faced with the task of applying the United States Supreme Court holdings in sex offender civil commitment evaluations. After the holding in *Crane*, he and others have had to apply the Court's analysis and adjust reports and consider volitional personality disorder issues as causal factors of sex offending. He prepared an addendum to a previous report which he shared with this author and addressed antisocial personality disorder diagnosis and psychopathy. He cited this language in the opinion:

and this proof of serious difficulty in controlling behavior, when viewed in light of such features of the case as the nature of the psychiatric diagnosis, and the severity of the mental abnormality itself, must

A. *Sex Offender Research: Recidivism and Treatment*

The issues of amenability and success in treatment as applied to sex offender recidivism studies are key in deciding if and when sex offenders should be released from civil commitment facilities. The question of who is likely to re-offend and what factors are tied to that recidivism are important, as they identify what type of offenders are more likely to re-offend and what demographic factors are associated with offending.

The current research on recidivism of sex offenders is growing, but it remains perplexing and uncertain. Most studies use re-conviction rates since many sex offenses are actually unreported. It is difficult at times to obtain a formal conviction, and therefore, there are more actual offenses than arrests and more arrests than convictions. Re-conviction rates appear to offer the most solid proof that a sex offense was actually committed. This data may be more readily available, but may not be as accurate as base rates for re-offending. Therefore, there are countless sex offenses that occur, and while many offenses become arrests, the majority of those

be sufficient to distinguish the dangerous sexual offender whose serious mental illness, abnormality, or disorder subjects him to civil commitment from the dangerous but typical recidivist convicted in an ordinary case.

Id. Doren believes that the nature of the diagnosed disorder and its severity are relevant to the finding of whether or not this condition distinguishes the individual from the "dangerous but typical recidivist." In the specific case, Doren believes that the respondent's antisocial personality disorder predisposed him to commit sexually violent acts, although most individuals with this diagnosis do not commit sex crimes. He believes that the nature of the individual's criminal personality is distinguished from the "dangerous but typical recidivist." However, the severity of the characterological deficit is uncertain. Doren found that the respondent was no more psychopathic than the average prison inmate, but more psychopathic than the average sex offender. Doren found the respondent to have certain personality traits that were indicative of underlying recidivism risk representing a significant severity of the disorder beyond the "dangerous but typical recidivist." He concluded that the respondent's antisocial personality disorder entails a condition that causes him to have "serious difficulty in controlling behavior." Does that mean that antisocial personality disorder and psychopathy indicate a volitional impairment? That is a key question in light of the *Crane* decision. Doren and other evaluators are forced with the task of analyzing and dissecting diagnoses such as antisocial personality disorder, an accepted diagnosis in the field dealing with features of a criminal personality and often viewed as an avolitional/emotional/personality diagnosis as the individual can choose to or not to engage in antisocial behaviors. This diagnosis is different than a diagnosis of pedophilia, a disorder that requires an impulse control/volitional issue. It is difficult to dissect such a diagnosis that has volitional and avolitional factors and relate them to the etiology of the sex crime(s).

sex offenses do not later become convictions.

Along these lines, the issue of base rates, the true number of offenses committed by a given group of offenders, is the number with which to be concerned. It is impossible to know true base rates due to the fact that some offenses are never reported and/or charges are dropped due to poor investigation techniques, lack of cooperation by victims or witnesses, or violation of the individual's constitutional rights in some aspect.

There are several sex offender recidivism studies that address the likelihood that sex offenders will re-offend. These studies assist mental health professionals and decision makers in the development of risk prediction instruments that incorporate the factors most highly correlated with sexual recidivism. A 1997 study by Robert Prentky et al. provides a comprehensive study on sex offender recidivism.³⁶⁸ The authors examined recidivism rates for sex offenders focusing on child molesters and rapists. The authors found that in evaluating rapists, thirty-nine percent of them had a failure rate (re-charged) after twenty-five years, while twenty-four percent were actually re-convicted at a later date.³⁶⁹ The study also determined that failure rates for child molesters was fifty-two percent.³⁷⁰

A 1998 study by Dennis Doren, concentrated on the importance of recidivism base rates as opposed to re-conviction rates.³⁷¹ Doren stated that one needs a reasonable estimation of the base rate of violence within a certain population to provide a reliable and effective prediction of future dangerousness under civil commitment laws.³⁷² Since most studies regarding sexual recidivism use

368. Robert A. Prentky et al. *Recidivism Rates Among Child Molesters and Rapists: A Methodological Analysis*, 21 LAW & HUM. BEHAV., 635 (1997). The authors operationalized recidivism as a failure rate and calculated as the proportion of offenders who re-offended using survival analysis. The authors classified charges as opposed to a conviction as a re-offense. *Id.* at 641.

369. *Id.* at 643.

370. *Id.*

371. Dennis Doren, *Recidivism Base Rates, Predictions of Sex Offender Recidivism, and the "Sexual Predator" Commitment Laws*, 16 BEHAV. SCI. & L. 97, 97-114 (1998). See also DENNIS DOREN, EVALUATING SEX OFFENDERS: A MANUAL FOR CIVIL COMMITMENTS AND BEYOND, Vol. 3, (2002) (describing different states' civil commitment procedures, describes research concerning recidivism, discusses the clinical versus actuarial debate, clinical/diagnostic issues, admissibility issues, and provides information on report writing for court).

372. Base rates are described as being the "true prevalence of the defined behavior within the defined population." *Id.* at 98 (citing Randy Borum, *Improving the Clinical Practice of Violence Risk Assessment*, 51 AM. PSYCHOL. 945, 945-56 (1996)).

reconviction rates as failures, those rates tend to seriously underestimate the true frequency in which sex offenses occur.³⁷³ Doren asserts that current sex offender recidivism research underestimates the true base rates because the studies do not last long enough and do not track the offenders over a lengthy period of time, as some offenders commit crimes over twenty years after release from incarceration.³⁷⁴

Logic tells us that many sex offenders do not get caught for their crimes, but researchers must use only reported acts of sex offending behavior to qualify as offenses.³⁷⁵ Doren cited the 1997 Prentky et al. study, as the most appropriate report on recidivism.³⁷⁶ The 1997 study indicated a fifty-two percent failure rate for extra-familial child molesters over a twenty-five-year period and reasoned that this figure might still be underestimating the true base rate for that population because not every new offender was caught and legally charged for at least one new sexual crime.³⁷⁷ Doren believes that the fifty-two percent recidivism figure is a conservative approximation of the true base rate for recidivism.³⁷⁸ Doren also referred to Hanson et al., which reported a sex offender recidivism rates for child molesters of about thirty-five percent.³⁷⁹ Doren cited Hanson and Bussiere's 1996 meta-analysis involving over sixty-one studies and close to ten thousand offenders and found that almost thirteen percent of child molesters sexually re-offended in an average period of four to five years after their release from prison.³⁸⁰ The Hanson and Bussiere meta-analysis reported that close to nineteen percent of rapists sexually re-offended after four to five years

373. *Id.* at 99.

374. *Id.*

375. *Id.*

376. *Id.*

377. *Id.* at 101.

378. *See id.* at 101. Doren offered an example of a defendant who was never caught and legally charged for a new offense, but was inaccurately labeled as a non-re-offender. Importantly, some small group of offenders are charged with sex crimes and may be innocent of them and other sex offense charges, this group would likely be smaller than the number of re-offenders who are never caught and charged. *Id.*

379. *Id.* at 102. *See* R. Karl Hanson et al., *A Comparison of Child Molesters and Nonsexual Criminals: Risk Predictors and Long-Term Recidivism*, 32 J. RES. IN CRIME & DELINQ., 325, 325-37 (1995). Hanson used re-conviction rates as recidivism in his study. Hanson also included incest offenders who are known to have lower sexual recidivism rates. *Id.*

380. Doren, *supra* note 371, at 104. *See* Hanson & Bussiere, *supra* note 366. This rate was similar to other studies after four to five years after incarceration release.

after release.³⁸¹

Additionally, Doren warned against the tendency to falsely predict non-recidivism and falsely predict recidivism. He believed that there is a significant “under prediction” of sexual offending in relation to the civil commitment of sex offenders and the evaluations for these civil commitment hearings.³⁸² Finally, in the study, Doren supported research that incorporates longer study periods offering more time to re-offend as well as broadening the definition of re-offense to recharge for example rather than reconviction, which would approximate the true base rate of sex offending, offering a more reliable estimate of sexual violence risk prediction.³⁸³

In addition, an important study by Hanson and Bussiere in 1998 offers the most extensive meta-analysis of sex offending studies.³⁸⁴ They found that demographic variables, including young age and single marital status, were related to sexual offense recidivism.³⁸⁵ Criminal lifestyle variables were modest predictors and antisocial personality disorder and total number of prior offenses had stronger correlations with future sex offending.³⁸⁶ The risk for future sex offenses was greater for offenders who had a prior sex offense, had victimized strangers, had extrafamilial victims, began sex offending at a young age, had male victims, and engaged in a wide variety of sexual acts during the offense.³⁸⁷ The strongest predictors of sexual recidivism were sexual deviancy and sexual interest in children measured by phallometric assessment, which by itself was the single most highly correlated factor indicative of future sex offending.³⁸⁸ Failure to complete treatment and a negative relationship with one’s mother were also significant factors; however, being a victim of sexual abuse as a child was not significantly related, contrary to popular belief.³⁸⁹ The study concluded that rapists were more likely to engage in nonsexual violence than were child molesters.³⁹⁰

381. Doren, *supra* note 371, at 106.

382. *Id.* at 110.

383. *Id.*

384. Hanson & Bussiere, *supra* note 366.

385. *Id.* at 351.

386. *Id.*

387. *Id.*

388. *Id.* Phallometric assessments of sexual interest in rape were not significantly related to recidivism. *Id.* at 351, 353.

389. *Id.* at 353.

390. *Id.* The authors found that nonsexual violent recidivism and general criminal recidivism were best predicted by criminal history. *Id.* at 354.

Previously, a 1990 study by Rice et al. examined the follow-up of rapists after release from incarceration to assess general, violent, and sexual recidivism.³⁹¹ They found that the best statistical predictors of sex offending were sexual aggression, sexual deviance, and general criminal behavior.³⁹² The authors found that sexual and violent recidivism were predicted by phallometrically measured sexual interest (sexual deviancy) and degree of psychopathy.³⁹³ Similarly, an article by Quinsey et al. addressed the likelihood of sex offending recidivism in rapists and child molesters by implementing a prediction scale, an actuarial risk prediction instrument, and found that sexual recidivism was predicted by: previous criminal history, psychopathy ratings, and phallometric assessment data.³⁹⁴ These studies have revealed profound results as a specific population of sex offenders, those who experience sexual deviancy and severe antisocial personality (psychopathy), are at a significantly high risk to sexually re-offend.³⁹⁵

In addition, other studies have provided further insight into recidivism. For example, Serin et al. examined psychopathy, deviant sexual arousal, and sexual recidivism and found that there is a significant relationship existing between sexual deviance and psychopathy, most notably for extrafamilial child molesters than rapists and incest offenders.³⁹⁶ A study by Rice et al. examined the recidivism of child molesters.³⁹⁷ Factors found to be correlated with sexual recidivism included single marital status, previous admissions to correctional facilities, previous convictions for property crimes, male victims, previous sexual offense convictions, diagnosis of a personality disorder, and significant phallometric scores regarding inappropriate sexual age preferences.³⁹⁸

A study by Hanson et al. compared recidivism rates between child molesters and nonsexual criminals.³⁹⁹ In that study, the au-

391. Marnie E. Rice et al., *A Follow-Up of Rapists Assessed in a Maximum-Security Psychiatric Facility*, 5 J. INTERPERSONAL VIOLENCE 435 (1990).

392. *Id.* at 446.

393. *Id.*

394. Vernon L. Quinsey et al., *Actuarial Prediction of Sexual Recidivism*, 10 J. INTERPERSONAL VIOLENCE 1 (1995).

395. For a review of psychopathy, see James F. Hemphill et al., *Psychopathy and Recidivism: A Review*, LEGAL & CRIMINOLOGICAL PSYCHOL. 3 (1998).

396. R. C. Serin et al., *Psychopathy and Deviant Sexual Arousal in Incarcerated Offenders*, 9 J. INTERPERSONAL VIOLENCE 3, 8 (1994).

397. Marie E. Rice et al., *Sexual Recidivism Among Child Molesters Released From a Maximum Security Prison*, 59 J. CONSULTING & CLINICAL PSYCHOL. 381 (1991).

398. *Id.* at 383.

399. R. Karl Hanson et al., *A Comparison of Child Molesters and Nonsexual Crimi-*

thors found differences between child molesters and nonsexual offenders regarding recidivism, as the child molesters tended to be older, more often married, less educated, and had less extensive criminal records for nonsexual offenses than the nonsexual offenders.⁴⁰⁰ The child molesters in the sample comprised about ninety-seven percent of the sexual offense recidivism in the sample, while the nonsexual offenders were responsible for about ninety-six percent of the nonsexual recidivism.⁴⁰¹

Ultimately, there is a growing amount of research regarding recidivism and the issue of base rates, the true occurrence of offending, but small samples in studies limit the research. These studies are providing ample data to develop actuarial risk prediction instruments, which are very useful when evaluating an offender's risk.

A comprehensive study by Hall in 1995 involved a meta-analysis of sex offender treatment studies, and found that nineteen percent of sex offenders who completed treatment in the studies committed future sex offenses, while twenty-seven percent of sex offenders who did not complete treatment sexually re-offended.⁴⁰² Some studies suggest that relapse prevention and cognitive-

nals: Risk Predictors and Long-Term Recidivism, 32 J. RESEARCH IN CRIME & DELINQ. 325 (1995).

400. *Id.* at 334.

401. *Id.* While both groups showed high rates for nonviolent offenses, the nonsexual offenders had higher rates than the child molesters.

402. Gordon C. Nagayama Hall, *Sexual Offender Recidivism Revisited: A Meta-Analysis of Recent Treatment Studies*, 63 J. CONSULTING & CLINICAL PSYCHOL. 802, 806 (1995). The author found that both cognitive-behavioral and hormonal treatments appear more successful than strictly behavioral treatments. *Id.* at 807. A criticism of the study could be that it overestimates the efficacy of treatment because it uses official reoffense data which may underestimate the true base rate of sex offending. *Id.* at 808. For a comprehensive review of sexual offender risk assessment research and treatment efficacy, consult Robert A. Prentky & Ann W. Burgess, *Forensic Management of Sex Offenders* (2000). The authors provide information on factors correlated with future risk such as gender of victim, strength of preoccupation with children, prior sex offenses, substance abuse and social competence, antisocial behavior and psychopathy. While they warn that base rates for sex offenders are unreliable, they discuss actuarial risk assessment instruments that assist in predicting future sexual recidivism. In addition, the authors address treatment modalities and efficacy issues as well as sex offender typologies into six types of sex offenders including interpersonal offenders, narcissistic offenders, exploitative offenders, muted sadistic offenders, aggressive offenders, and overt sadistic offenders. Treatment programs for sex offenders often focus on relapse prevention and cognitive behavioral type modalities focusing on development of empathy, anger control problems, cognitive distortions and rationalizations, sexual fantasies and deviant sexual arousal, antisocial personality and criminal lifestyle variables. *Id.*

behavioral modeled programs, along with strict supervision, monitoring, conditional release programs, polygraphs and phallometric monitoring, are effective treatment strategies.

A comprehensive study by Margaret Alexander in 1999 involved a meta-analysis regarding the efficacy of sex offender treatment.⁴⁰³ This analysis examined relevant studies of sex offender treatment between 1943 through 1996 involving child molesters and rapists.⁴⁰⁴ The recidivism rate for treated juvenile sex offenders was 7.1%, for treated rapists was 20.1%, for treated child molesters was 14.4%, treated exhibitionists was 19.7%, for type-not-specified was 13.1%, and the total treated offender group recidivism rate was 13%.⁴⁰⁵ The untreated recidivism data, including the untreated juvenile recidivism rate, was not applicable. The untreated rapist group was 23.7%, the untreated child molester group 25.8%, the untreated exhibitionistic group 57.1%, and the total untreated group of sex offender recidivism rate was 18%.⁴⁰⁶ The authors found that the most successful treatment modality was the relapse prevention model.⁴⁰⁷ Further, many treated sex offenders had re-offense rates below eleven percent, possibly suggesting that many offenders do not need permanent institutionalization for treatment, and once treated, offenders may be monitored in the community which would be more cost-effective than inpatient treatment.⁴⁰⁸

These studies all support the fact that the issue of sex offender treatment efficacy affects many states, especially those implementing civil commitment of sexual predator laws. Unfortunately, the data is conflicted regarding whether the successful completion of treatment in fact lowers risk of re-offending. If studies do not con-

403. Margaret Alexander, *Sexual Offender Treatment Efficacy Revisited*, 11 *SEXUAL ABUSE* 109 (1999).

404. *Id.* at 103. The meta-analysis involved over 10,000 subjects. The subject pool unfortunately did not include subjects who were terminated or dropped out. Recidivism was defined as the number of offenders who were re-arrested for a new sexual offense. *Id.* at 104. The author stated that re-arrest yields higher and more accurate re-offense rates than re-conviction data. *Id.* at 111.

405. *Id.* at 105.

406. *Id.* at 105. Overall, the treated group as a whole re-offended at a thirteen percent rate, whereas the untreated group re-offended at an eighteen percent rate.

407. *Id.* at 106. They also found that outpatient treatment was similar in effectiveness to a hospital setting. *Id.* at 107. The authors found that treatment affected the recidivism rates of child molesters who had offended against males more than any other sex offender type. *Id.* at 109.

408. *Id.* at 110.

sistently indicate lower recidivism rates among the treated, then these commitments will be in essence no more than warehouses of the sexually dangerous, and these individuals will never be released.

B. The Role of the Forensic/Clinical Psychologist as Expert Witness in Civil Commitment of Sexual Violent Predator Cases

Forensic psychological/psychiatric evaluations involving sexual predator classifications for community notification and registration conditions, parole sex offender evaluations, and evaluations for civil commitment of violent sexual predators primarily involve two analyses. First, a mental health professional must conduct a thorough clinical interview and gather clinical data about the defendant.⁴⁰⁹ Second, the evaluator should use actuarial instruments and compare the data on the offender, such as age and type of victim to norms measuring the same data of sex offenders who have been released from incarceration, some being re-convicted of another sex offense. The actuarial instruments provide a risk analysis, often a percentage of likelihood of re-offending and a classification such as low, moderate, or high risk.

In civil commitment evaluations, prison officials often warn state officials of a high-risk sex offender to be released from prison, and the offender will be evaluated upon probable cause. Also, an evaluation along with a civil hearing with a jury will be conducted. The evaluation will focus on the incorporation of actuarial instruments and clinical data, with the objective of clinically adjusting actuarial instruments. If the respondent is committed, he will be sent to a civil commitment sex offender treatment facility, and he will be eligible for annual reexaminations. These examinations focus on treatment success as well as clinical information, since the actuarial

409. There is a tendency in civil commitment states, more so than in community notification states (Megan's law), for defense attorneys to advise their clients to refuse to submit to the formal sex offender evaluations, either before sentencing or while in prison, and the defendant has a right to do so based on a continuing right against self-incrimination in criminal cases. Therefore, quite often there may be no clinical interview; this occurs in approximately forty percent of the evaluations. This lack of information places limits on a solid clinical interview and can affect the evaluator's ability to assess certain personality traits such as psychopathy based solely on a record or file review. Further, some clients, once civilly committed in treatment, will be directed by attorneys to refuse treatment or refuse participation in certain aspects or types of treatment - such as phallometric assessment - and often the focus switches from mental health treatment issues to legal issues involving matters such as self-incrimination.

risk predictions incorporate mostly static and unchangeable factors.

To this date, actuarial risk prediction instruments focus primarily on static factors, such as age of the victim and the criminal history of the defendant, while consideration of dynamic factors is limited. They include elements such as termination from sex offender treatment and age after release from prison. Current research is focusing on the development of dynamic risk predictors. Some clinicians are seeing that sex offenders' risks are not changing dramatically while in commitment. Their actuarial scores, which are more reliable than an evaluator's clinical judgment, for the most part do not change over time. Therefore, one could be committed indefinitely.

The clinical versus actuarial debate has caused significant controversy in the psycho-legal field of violence risk prediction. It is beyond the scope of this paper to analyze this debate; however, overall research has increasingly revealed that actuarial risk instruments normed on certain populations of offenders exhibit more predictive reliability and validity than the clinical judgment of psychologists and psychiatrists alone. The current research suggests for a clinician to clinically adjust or modify actuarial risk instruments.⁴¹⁰ To date, courts in various jurisdictions have upheld the admissibility of actuarial risk instruments in light of *Daubert*.⁴¹¹

In a wide variety of medical and social science studies, actuarial assessments consistently meet or surpass the accuracy of clinical assessments.⁴¹² Actuarial instruments address factors that are known to be correlated with sex offending, such as length of sex offending, gender of victim, use of force, multiple victims and stranger victims. Because actuarial data is generally viewed to be more reliable than clinical judgments, some argue that sex offenders should be civilly committed based on actuarial risk level, not based on

410. See William M. Grove and Paul E. Meehl, Comparative Efficiency of Informal (Subjective, Impressionist) and Formal (Mechanical, Algorithmic) Prediction Procedures: The Clinical-Statistical Controversy, *PSYCHOL., PUBLIC POLICY, AND LAW*, Vol. 2, No. 2, 293-323 (1996). The authors cited numerous studies that reveal that actuarial methods are almost invariably equal to or superior than clinical judgment concerning risk assessment. *Id.* at 293. See also, Richard Rogers, The Uncritical Acceptance of Risk Assessment in Forensic Practice, *LAW AND HUM. BEHAV.*, Vol. 24, No. 5 (2000). The authors describe the forensic psychologist's role in violence risk prediction. Assessment issues to consider include comprehensiveness, measurement, and base rate estimates.

411. *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993).

412. N. Zoe Hilton & Janet L. Simmons, *The Influence of Actuarial Risk Assessment in Tribunal Decisions about Mentally Disordered Offenders in Maximum Security*, 25 *LAW & HUM. BEHAV.* 394 (2001).

whether their acts are avolitionally or volitionally-based.⁴¹³ This argument is in line with an empirical decision where the subjectivity and clinical expertise of a psychologist sometimes plays a secondary role to the more reliable statistical information. Ideally, the psychologist should make a clinical adjustment of actuarial data. Current research indicates that actuarial data should be clinically modified or adjusted by a mental health professional.

However, the assessment of risk is difficult for a mental health professional, as they are not able to read crystal balls. Rather, their job is to provide the judge or jury with the most information possible. Some cases can be very difficult, as some offenders are low risk actuarially and high clinically. When an offender scores high on actuarial instruments, he will possess significant clinical risk factors. In addition, clinicians are faced with the burden and dilemma of assessing the etiology of the offending behavior between volitional and avolitional causative factors and disorders.

For example, consider an armed robber who has antisocial personality disorder and is avolitionally impaired, has three total sex offense convictions, and presents with the same actuarial risk level as that of a volitionally impaired pedophile. The pedophile also has three sex offense convictions and does not suffer from antisocial personality disorder, but has a volitional impairment. Based on their hypothetically similar actuarial risk, both of these offenders should be deemed about equally sexually dangerous despite the etiology of their sex offending (volitional versus avolitional impairment). As previously mentioned, the sexual sadist psychopathic pedophile who is both avolitionally and volitionally impaired, and who has three sex offense convictions would be the highest risk for sex offending.

Some authorities argue that an individual such as a career armed robber who is violent in nature and has a severe antisocial personality disorder should be confined indefinitely or civilly committed after he has served his prison term to protect society from future danger.⁴¹⁴ Consequently, there would be no limits to

413. The most well known actuarial risk prediction instruments for sex offenders include the Minnesota Sex Offender Screening Tool-Revised, (MnSOST-R), Static 99, Rapid Risk Assessment for Sex Offender Recidivism, (RRASOR). These instruments are normed on populations of sex offenders, some who have offended and others who have not. The factors on the instruments are assigned relative weights and are retained if they were significantly related to re-offense status.

414. See Morse, *supra* note 27, at 264. Antisocial personality disorder includes a history of conduct disorder (antisocial and delinquent behavior as a youth), fail-

the power of the states to indefinitely incarcerate any type of dangerous offender.⁴¹⁵ This theory was largely argued after the implementation of the Durham rule, as attorneys and mental health professionals attempted to classify all mental disorders, including antisocial personality disorder and psychopathy, as mental diseases or defects that could be a basis for the commission of the crime.

However, an issue that needs to be extrapolated is the definitions of mental disabilities, disorders, and abnormalities. The problem remains that there is no distinct and consistent agreement within the psychological and psychiatric community on definitions of mental health issues. Simply put, this is not a simple black and white issue and will be a continued source of debate until definitions are put into place by a legislative body. The United States Supreme Court has consistently chosen to take a role in distinguishing definitions, and as a result, balancing community safety versus civil liberties. For instance, in *Young*, the United States Supreme Court validated its decision in *Hendricks*, wherein it determined that the process of civil commitment of violent sexual predators is a civil act as long as sex offender treatment is provided in a separate facility.⁴¹⁶ The Supreme Court's decisions in *Hendricks* and *Young* had a substantial, broad based effect on the mental health field regarding issues such as mental illness, dangerousness, treatment, and protection of society.

Moreover, the United States Supreme Court held that the Kansas Act was not punitive, nor was Hendricks charged twice for the same offense, but that civil commitment was a civil proceeding with a primary focus on treatment and rehabilitation. The statute provides for treatment that is more civil than criminal in nature and separate from corrections and punishment. The statute recognizes that some defendants cannot volitionally control themselves and they possess a mental disorder that is associated with risk for future sexual violence. In *Crane*, the Court held that a sex offender can be civilly committed if he suffers from a volitional and or emotional or personality disorder that causes him to be a risk for future sexual dangerousness and that the volitional requirement

ure to conform to social norms with respect to lawful behaviors, deceitfulness, impulsivity, irritability and aggressiveness, reckless disregard for the safety of self or others, consistent irresponsibility, lack of remorse. DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS, 649-50 (4th ed. 1994) (DSM-IV).

415. DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS, 649-50 (4th ed. 1994) (DSM-IV).

416. *Young*, 531 U.S. 250, 261.

was not necessary. The key issue in *Crane* was the inclusion of a personality disorder as a causal factor of one's sex offending. The State of Kansas (along with about sixteen other states) is not only providing dangerous sex offenders with the treatment they need, but is also protecting the community against the risk of re-offending by identified sex offenders. It must be noted that the decision in *Crane* to civilly commit offenders who are dangerous and suffer from a personality disorder appears to conflict with the Court's holding in *Foucha*, concerning the unconstitutionality of civilly committing an offender who suffered from antisocial personality disorder and was deemed dangerous.

Some states like California have implemented such programs, but are not releasing sex offenders who have been evaluated and recommended for release. In some cases, hospital administrators appear to be questioning and challenging the intent of the legislature and purposes of the civil commitment laws. Based solely on the overriding recommendations of the administrators, the sex offenders are not being released, but are re-committed after participating in treatment. This raises the issue of whether civil commitment actually has a punitive purpose.

For example, in *People v. Superior Court (Ghilotti)*,⁴¹⁷ the California Supreme Court considered a sex offender's future after being treated at a civil commitment hospital for sex offenders. After he completed most of the program, evaluators recommended that he be released, yet the hospital's administrator would not allow the discharge of the patient. Ghilotti had committed two separate sex offenses, served prison terms, and was civilly committed at a state hospital.⁴¹⁸ Two psychologists evaluated Ghilotti and found he should be released from civil commitment.⁴¹⁹ The director disagreed with both evaluators and cited their reports that indicated a likelihood of re-offending if Ghilotti was released without treatment and supervision.⁴²⁰ The director wrote to the prosecutor, ask-

417. *People v. Superior Court*, 44 P.3d 949 (Cal. 2002) [hereinafter *Ghilotti*].

418. *Id.* at 952.

419. *Id.*

420. *Id.* The two psychologists were required by statute to be recommended by the director. They both recommended release but also recommended he be released from the civil commitment on conditional release, which would have included supervision and treatment. *Id.* The psychologists emphasized that these requirements of conditional release would be important to attempt to reduce his risk of re-offending. *Id.* Hospital psychiatrists who were familiar with his treatment reported that he was not ready for unconditional release and his mental disorder continued to place him at high risk for re-offending. *Id.* A third evaluator

ing her to refile a petition for his recommitment and indicated he disagreed with the evaluators, stating their reports did fulfill the statutory requirements for recommitment.⁴²¹ The prosecuting attorney argued that the director may disregard the designated evaluators' reports and request a refiling of commitment if he concluded that Ghilotti remained mentally disordered and at risk for future sex offending if not treated or supervised.⁴²² The superior court rejected the prosecutor's argument that the director may request a petition for recommitment without consideration of the evaluator's recommendations, and it was recommended that Ghilotti be released.⁴²³

In *Ghilotti*, the California Supreme Court addressed the issue of likely requiring substantial danger. The court held that a recommitment petition could not be filed without the agreement of two designated evaluators required by the statute.⁴²⁴ The court addressed issues including whether a recommitment of a sexual offender petition may be filed without the concurrence of two designated evaluators as set forth in the statute.⁴²⁵ Further, the court considered whether the trial court could review the evaluators' reports for material legal error, and the definition of the statutory standard on which the evaluators opine—such as whether the person has a mental disorder that makes him “likely” to engage in acts without appropriate treatment and custody.⁴²⁶

was also designated to evaluate Ghilotti and he also concurred with the two other psychologists. *Id.* Initially, a defendant is screened by the Department of Corrections before their release from prison and then he is evaluated by two designated mental health professionals using a standardized assessment protocol. *Id.* If both evaluators concur that a person is likely to commit future sex offenses and suffers from a mental disorder, the director will forward a request for petition. *Id.* If one evaluator finds that the person meets criteria for commitment and the other one disagrees, two independent professionals are appointed to evaluate the defendant. *Id.* at 959-60. The court stated that the statute did not have a provision for judicial review of the reports of the designated evaluators for legal error. *Id.* at 962.

421. *Id.* at 952.

422. *Id.* at 952. Ghilotti refused to accept all of the terms of his conditional release plan, specifically refusing medication compliance (Luprone for chemical sterilization purposes) and supervised outpatient treatment. *Id.* at 956.

423. *Id.* at 952.

424. *Id.* at 961.

425. *Id.*

426. *Id.* at 951. The director wanted the court to examine the evaluator's application of the law in their reports and believed they were incompetent. The court considered the statute's standards of assessment including evaluations focusing on a standardized assessment protocol addressing mental disorders, criminal and sexual history, duration of sexual deviance and their association with future sex offending risk. The evaluators answer the ultimate question of whether the

The State argued that the purpose of the statute was to protect the public from sex offenders, and this was best served by allowing the director to independently evaluate the current functioning and risk of the offender while under the director's custody.⁴²⁷ In response, Ghilotti argued that the statute's requirement of the concurrence of two evaluators, along with the failure to provide for judicial review of the evaluator's reports, allows him a Due Process right to rely solely on the two evaluators' reports.⁴²⁸

Ultimately, the court held that judicial review is limited to whether the reports of the evaluator(s) are not in accordance with the law.⁴²⁹ If the court's review of the reports do not indicate material legal error, then they must accept the evaluator(s) reports and either dismiss the petition or continue with the proceedings to determine if the individual is a sexually violent predator.⁴³⁰ The court recommended in future cases that the trial court should review the report(s) of the evaluator(s) to determine if there is any material legal error on its face.⁴³¹

Additionally, the court addressed the definition of "'likely' to re-offend."⁴³² While Ghilotti attempted to define "likely" as "highly likely" or at least "more likely than not," the People attempted to define it as "a significant chance, not minimal; something less than 'more likely than not' and more than merely 'possible.'"⁴³³ The

offender has a mental disorder and whether he is "likely" to commit future sexual violence without appropriate treatment and custody. *Id.* at 962.

427. *Id.* at 965. The State argued that the director, through discussion with the treatment staff in the hospital, can assess the offender's condition perhaps better than outside evaluators. *Id.*

428. *Id.* at 966. The court disagreed with Ghilotti's assertion. The court stated that judicial power allows a judge to determine whether an evaluator's opinion is legally sound and follows the criteria set forth in the statute. *Id.* The court stated that the director should not be powerless to protect the public when he disagrees on legal grounds with the evaluators' conclusions that an offender does not meet the requirements of civil commitment; "means must exist by which he can make that issue the subject of judicial inquiry." *Id.*

429. *Id.* at 960. The court believed that judicial review of the reports does not extend to issues of debatable professional judgment if they are based on correct legal standards. If the court determines there is legal error committed by an evaluator, it must be material legal error, affecting the evaluator's ultimate findings and conclusions.

430. *Id.* The court offers the evaluator(s) the opportunity to correct the material legal error.

431. *Id.*

432. *Id.* at 962. The court addressed whether the person is diagnosed with a mental disorder so that he is likely to commit future acts of sexual violence without appropriate treatment and custody.

433. *Id.* at 964. The court stated that neither party was entirely correct, and

court also struggled with the elements of mental disorder and “likely to re-offend” in the statute.⁴³⁴ The court concluded that “likely” involves more than the “mere possibility” that the person will re-offend due to a mental disorder that impairs volitional control.⁴³⁵ The court held that “an evaluator must conclude that the person is ‘likely’ to re-offend if, because of a current mental disorder which makes it difficult or impossible to restrain violent sexual behavior, the person presents a ‘substantial danger,’ that is, a ‘serious and well-founded risk,’ that he will commit such crimes if free in the community.”⁴³⁶ The court stayed Ghilotti’s release from the civil commitment hospital pending the superior court’s determination whether to dismiss the recommitment petition as legally inadequate, or to continue with recommitment proceedings pursuant to the statute.⁴³⁷

After reading *Ghilotti*, does the concept of Due Process exist? May a director of a treatment program for civilly committed sex offenders deny a sex offender’s discharge even though independently appointed evaluators recommended his conditional release? Isn’t this prison? Will sex offenders who successfully complete a treatment program designed for them ever be released?

did not agree that “likely” to re-offend means more than fifty percent, rather, he must present as a “substantial danger,” a “serious and well-founded risk” of re-offending if not in custody. *Id.* The court agreed with Ghilotti that the phrase “without appropriate treatment and custody” does not prevent the evaluators from determining that the offender’s amenability to treatment reduces his risk and therefore does not meet the criteria for commitment. *Id.* at 962. The court consulted with various definitions of “likely” using dictionaries and thesauruses as well as other California court cases. The court has consistently relied upon “reasonable likelihood” meaning less than “more probable than not” and something more than “merely possible.” *Id.* at 962.

434. *Id.* at 965. The particular form of dangerous mental disorder rather than the degree of dangerousness distinguishes a dangerous sex offender subject to civil commitment from other dangerous offenders. If a defendant’s disorder causes difficulty in controlling violent impulses that does not indicate that he has no control over the impulses. The court addressed the issue of “likely” regarding the purpose of the statute, to protect the public from a limited number of offenders whose incarceration is ending but continue to poses significant risks of future sex offending. The term “likely” is also considered from a statistical standpoint regarding the difficulty mental health experts have in predicting human behavior. *Id.* at 966.

435. *Ghilotti*, 44 P.3d at 966.

436. *Id.* The court reasoned that if the offender is dangerous without treatment but safe and representing less risk of re-offending with treatment, he does not necessarily have to be treated in custody. The needs for treatment and custody are not synonymous. *Id.* at 967.

437. *Id.* at 966.

C. Ohio's Sexual Violent Predator Specification on Indictment: A State's Criminal Alternative to Civil Commitment

In January 1997, the State of Ohio implemented what is, in this author's belief, a criminal code alternative to civil commitment of sex offenders. Ohio Revised Code section 2941.148 sets forth a sexually violent predator specification on an indictment or plea by way of information for specific offenses including: homicide, assault, kidnapping, or other sexually violent offenses.⁴³⁸ This law is separate and distinct from the State's community notification, sexual predator law (Ohio's version of what is commonly referred to as Megan's Law), and Ohio Revised Code section 2950.09.⁴³⁹ Ohio's sexually violent predator specification statute mandates five specific factors that a judge must consider in determining whether a person is a sexually violent predator.⁴⁴⁰ The statute also allows a judge to

438. OHIO. REV. CODE § 2941.148 (1997).

439. OHIO. REV. CODE § 2941.148 specifically addresses the separate specification, which can be attached to a count in an indictment or an information in a criminal case. The statute sets forth numerous factors including: the offender's age, prior criminal record, the age of the victim(s), multiple victims, whether drugs or alcohol were used to impair the victims, prior sex offenses and prior sex offender treatment, any mental illness, whether there was a pattern of abuse or cruelty, and any additional behavioral characteristics of the defendant. In fact, some of these factors outlined in the Ohio version of Megan's law such as whether drug and alcohol use to impair the victim of the instant offense are not empirically related to sex offender recidivism. Legislators should consult with mental health professionals in drafting future statutes in line with current research. This statute is separate and different from OHIO. REV. CODE § 2950.09, which specifically addresses factors to be considered in determining whether an individual who is or has been convicted of a sexually oriented offense should be classified in one of three categories: 1) sexually oriented offender, 2) habitual offender, or 3) sexual predator. While the first statute is essentially an additional charge in the indictment (the defendant faces an additional penalty if convicted of the specification) and the other deals with reporting requirements of individuals upon their release from prison, the two statutes take into consideration similar factors. OHIO. REV. CODE § 2950.09 takes into account nine specific factors, which are similar to those considered in OHIO. REV. CODE § 2941.148 and OHIO. REV. CODE § 2971.01(H)(1)-(6). An individual may be affected by both of these statutes depending on the charges in the indictment or on information in a criminal case.

440. OHIO. REV. CODE § 2971.01(H)(1)-(6) consists of five specific factors and one factor which may be considered a "catch all," which states "any other relevant evidence." The statute specifically states,

[a]ny of the following factors may be considered indicating a likelihood of future sexual recidivism: a) whether the person has been convicted two or more times, in separate criminal actions, of a sexually oriented offense; b) whether the person has a documented history from

sentence an individual who is found guilty of a sexually violent predator specification on indictment with an additional penalty of up to life in prison.

Some opponents may argue that this is a criminal alternative to keeping these offenders off the streets, but via a more legitimate and criminal procedure than most civil commitment procedures. However, others add that these individuals will never be provided treatment to address their sexual addictions and mental health issues since they may never be released from prison with a life sentence, based on Ohio's "truth in sentencing" guidelines.

Although some of the factors previously mentioned appear to be legitimately related to future risk such as torture, ritualistic acts and sexually deviant behavior, there is no definition of "likely." Furthermore, the last element contains a clause which is convenient for prosecutors, stating the "any other relevant evidence" "catch all" could potentially quantify or qualify any risk factor—whether it is empirically related to future risk or not. Is this a good or fair alternative to the present civil commitment laws in other states?

Based on a reading of Justice Breyer's dissenting opinion in *Hendricks*, it is likely that he would find Ohio's sexually violent predator specification law to be a fair alternative to civil commitment. In fact, there is a potential argument that Ohio's approach is more fair to an individual's civil liberties since the punitive intent of the act is clear from the onset, as opposed to being couched as therapeutic through a civil commitment scheme. Are civil commitment laws only masquerades for a longer prison term? Would not lengthy indeterminate sentencing schemes with harsh and punitive sentencing laws for repeat sex offenders make sense as an alternative? Would treating the high-risk sex offenders in prison before they are to be released be a plausible option?

The State of Ohio avoids spending millions of the taxpayers'

childhood, into the juvenile developmental years, that exhibits sexually deviant behavior; c) whether available information or evidence suggests that the person chronically commits offenses with a sexual motivation; d) whether the person has committed one or more offenses in which the person has tortured or engaged in ritualistic acts with one or more victims; e) whether the person has committed one or more offenses in which one or more victims were physically harmed to the degree that the particular victim's life was in jeopardy; f) any other relevant evidence.

OHIO. REV. CODE § 2971.01 (H) (2) (a)-(f).

dollars on providing high-risk offenders a treatment facility, which would require maximum security procedures and staff. Ohio is also saving the hiring costs of experts to evaluate these offenders in lengthy civil commitment jury trials, or conduct their annual reexaminations. Some argue that these cases are as difficult and time consuming as death penalty cases. Some research indicates a significant difference in recidivism amongst treated versus untreated sex offenders. However, these studies usually do not include the worst of the worst as their sample. If the goal is treatment, how do legislators know that the treatment will work with the highest risk offenders? Or, is this just a masquerade for prison and keeping society safe at the cost of individual liberty?⁴⁴¹

The interplay of law and psychology is an interesting one, but there are no certain crystal balls or mathematical formulas to aid in determining one's "likely" risk of sexually re-offending. The stakes are enormous. The United States Supreme Court's decisions in *Hendricks* and *Crane* impact these two unique fields in a compelling fashion. In fact, it seems as though the Court conflicts itself regarding their decisions in *Crane* and *Foucha* leaving the reader uncertain about whether a dangerous offender with an emotional/personality disorder can be civilly committed. The Court does not define "mental illness" or "likely," and leaves it in the hands of mental health professionals to evaluate and lawyers to argue, intricate issues of what makes a mind tick. Is the vicious sex offense and likelihood of re-offending due to an antisocial personality or a deviant sexual disorder? In either case, no one will ever know for certain if the offender will ever re-offend. Can society take that chance?

441. See John Q. LaFond, *The Costs of Enacting A Sexual Predator Law*, 4 PSYCHOL., PUB. POL'Y, & LAW 486 (1998) (discussing the economic costs of implementing a civil commitment law for sex offenders).