



including Jacob Wetterling, Jessica Lunsford, Megan Kanka, Jimmy Ryce, and Adam Walsh.

The following discourse on AWA focuses on one specific area of the AWA, the civil commitment of federal sex offenders pursuant to Title III Section 302.<sup>1</sup> Part One of this article discusses the law's inclusion of the civil commitment of federal sex offenders after their prison terms are completed, relevant to two U.S. Supreme Court landmark cases, *Kansas v. Hendricks* and *Kansas v. Crane*.<sup>2</sup> This article provides a historical background to state sex offender civil commitment schemes and will compare and contrast the AWA criteria with the statutory criteria of some state laws.

The AWA's civil commitment objectives will have a profound effect on many federal sex offenders in that it has extremely broad commitment criteria. Specifically, the statute lacks a "likelihood of future sexual dangerousness" requirement, and only requires the offender to qualify as a "sexually dangerous person" who must have "serious difficulty refraining from sexually violent conduct or child molestation if released." Consequently, this statutory language will necessitate a battle of the experts surrounding the assessment of volitional capacity and inability to control sex offending behaviors. Without a formal requirement of "likely to reoffend," it is possible that low-risk and non-contact sex offenders may be civilly committed indefinitely.

Additionally, a sexually dangerous person can be committed indefinitely without having a history of physical contact sex offenses. Instead, only a history of an attempt to engage in sexually violent conduct or child molestation (even if not criminally charged) is required. This element may have an effect on solicitation-type sex offenders who have made attempts and have not succeeded in a formal contact sex offense.

## To Catch A Predator, and Then Commit Him for Life

Analyzing the Adam Walsh Act's Civil Commitment Scheme Under 18 U.S.C. § 4248

### — Part One

The Adam Walsh Act (AWA) became law on July 27, 2006, and is the most complex, progressive, and punitive sex offender law ever enacted, responding to a public and political outcry of concern over sex offenders and their potential threat to society. The law has its conception grounded in public attention on several noteworthy sexual homicides towards children, and in fact recognizes by name a handful of these children

### The Adam Walsh Act

It is beyond the scope of this article to describe in detail the AWA statutory guidelines other than the civil commitment scheme. However, the reader should know that the statute enhances penalties for already

**Editor's Note:** Part Two of this article will outline the science of sex offender risk assessment as applied to federal sex offenders in Adam Walsh Act civil commitment hearing proceedings.

BY JOHN MATTHEW FABIAN

existing federal sex offenses and creates new federal sex offenses. Moreover, the statute establishes the Sex Offender Registration and Notification Act (SORNA), which creates a national registry and databank enabling law enforcement officers to access information about sex offenders and efficiently track them throughout the country. The law delineates risk levels for community registration and notification based on a three-tiered system that is not a risk-based classification system; rather, it is offense-based.

The AWA requires stricter juvenile sex offender notification elements that appear to conflict with the rehabilitative goals of juvenile justice.<sup>3</sup> The law expands definitions of kidnapping and restructures obscenity laws.<sup>4</sup> The AWA also restricts and undermines the ability of defense attorneys to access evidence regarding computer pornography crimes, ultimately affecting their ability to prepare for trial.<sup>5</sup> The AWA establishes the Federal Bureau of Prisons (BOP) as the provider of both sex offender management and sex offender treatment programs. The BOP is required to provide appropriate treatment to sex offenders who are in need of rehabilitation and who are appropriate for such treatment.<sup>6</sup>

## AWA Sex Offender Civil Commitment Statute

Title III, Section 302 of the AWA created the Jimmy Ryce Civil Commitment Program establishing civil commitment procedures for federal sex offenders. This section may be the most castigating feature of the statute due to the reality of life commitment for some sex offenders. The AWA's civil commitment scheme includes two primary objectives: (1) assisting in funding states who do not currently utilize this type of legislation, to establish, enhance, or operate effective civil commitment programs for sexually dangerous persons;<sup>7</sup> and (2) to mandate the civil commitment of sexually dangerous federal offenders.

Approximately 20 states in the nation entertain civil commitment statutes confining sexually violent predators. Many states have continued to reject these civil commitment bills, primarily due to the extraordinary funding they require relevant to the provisions of treatment for this population as well as legal representation and expert witness fees needed to properly evaluate their risk of sexual recidivism.

In an effort to provide states with financial assistance, the AWA authorizes grants to states that do not have civil commitment statutes in place.

The second objective allows the Attorney General, or any individual authorized by the Attorney General or the Director of the Bureau of Prisons, to certify any offender as a sexually dangerous person who is in the custody of the BOP, or who has been found incompetent or committed to the custody of the Attorney General pursuant to 18 U.S.C. § 4241(d), or against whom all criminal charges have been dismissed solely due to the mental condition of the offender. This certificate must be delivered to the clerk of the court for the district in which the person is confined.

The BOP had established firm procedural guidelines through the Federal Register, and others that they were continuing to modify. For example, the degree of informational or evidentiary support required for the BOP to distinguish whether a person is a sexually dangerous person — and hence civil commitment proceedings should be initiated — includes information sufficient to provide reasonable cause to certify a person as a sexually dangerous person.<sup>8</sup> The reasonable cause provision is perhaps a low standard for initiating commitment proceedings.<sup>9</sup>

A “sexually dangerous person” means that the defendant has engaged or attempted to engage in sexually violent conduct or child molestation and is sexually dangerous to others.<sup>10</sup> The phrase “sexually dangerous to others” means that the person suffers from a serious mental illness, abnormality, or disorder as a result of which he would have serious difficulty refraining from sexually violent conduct or child molestation if released.<sup>11</sup>

Currently, key definitions of the commitment section are being refined through the U.S. Department of Justice, Bureau of Prisons, which has wide latitude in creating its definitions and interpretations.<sup>12</sup> *The statute does not define the terms “sexually violent conduct,” “child molestation,” “mental disease, abnormality or disorder,” and “serious difficulty.”* The BOP is attempting to interpret these terms in part through federal criminal statutes. The BOP defines *child molestation* as any unlawful conduct of a sexual nature with, or sexual exploitation of, a person under the age of 18, which could potentially include possession of child pornography and consensual sex between teenagers.<sup>13</sup>

When considering the definition of *sexually violent conduct*, the BOP has relied on 18 U.S.C. § 2241 and § 2242,<sup>14</sup> and potentially does not require any *mens rea*<sup>15</sup> and broadens behaviors to include any conduct of a sexual nature.<sup>16</sup> The Bureau of Prisons outlines that the first step of determining evidence of sexually violent conduct or child molestation includes gathering information from the Pre-Sentence Investigative Report, Statement of Reasons, Criminal Judgment, and other resources indicated in § 549.70(c). Additional records include, but are not limited to, information from civil and criminal proceedings, information obtained by U.S. Attorney's Offices, federal and non-federal authorities, statements and admissions by the offender, and medical records. In essence, the government may use any information to substantiate its pursuit of a civil commitment.

*When considering the definition of a sexually dangerous person, “it is not necessary that a person have been charged with or convicted of any criminal act related to the conduct being considered — a limitation that could prevent a mental health professional from considering probative and relevant evidence such as long-established patterns of behavior, admissions of criminal activity previously undetected by authorities, and statements of intent to commit future sexually violent crimes or acts of child molestation.”*<sup>17</sup> The determination of whether the offender is a sexually dangerous person includes an assessment by a psychologist or psychiatrist as to the sexually dangerous person statutory criteria. Consequently, the BOP allows the mental health professional to consider all conduct and information, even if it is not based on formal charges or convictions, to assess the offender's difficulty in refraining from violent sex offending.

Individuals who are found incompetent to stand trial or not guilty by reason of insanity, or other offenders who have at some time demonstrated sexually violent conduct or child molestation through past charges or dismissed charges (not necessarily conduct based on a current conviction), can be considered for commitment.

The BOP has developed the practice of reviewing each sex offender's presentence report and file and identifying those who have a sex offender public safety factor and those who are almost ready to be released.<sup>18</sup> Amy Baron-

Evans and Sara Noonan have reviewed the files of many of the first certifications filed by the government in pursuit of commitment. They found that the BOP is focusing on offenders with prior contact or attempted contact offenses (regardless of whether the offenses were state or federal in nature), a finding of a diagnosis of pedophilia or other paraphilic sexual deviancy diagnoses, a diagnosis of antisocial personality disorder, and admissions to deviant sexual behavior or fantasies.

Prior to the civil commitment hearing that is adversarial in nature, the court may order that a psychiatric and/or psychological examination of the defendant be conducted and the subsequent report(s) be filed with the court.<sup>19</sup> The adversary hearing includes a determination by the court (not by civil jury trial), with the standard of clear and convincing evidence, whether the defendant is a sexually dangerous person.<sup>20</sup> If found a sexually dangerous person, the defendant will be committed to the custody of the Attorney General. Before discharge from commitment, the court shall hold a hearing to determine whether the offender, now civil respondent, should be released.<sup>21</sup> The legal threshold relevant to release includes proof by the preponderance of the evidence that the individual is no longer sexually dangerous to others or will not be sexually dangerous to others if released under a prescribed regiment of medical, psychiatric, or psychological care or treatment.

The AWA statutory guidelines leave many issues unresolved, including those listed below.

- ❖ The AWA does not establish a standard or burden of proof for risk to reoffend and does not permit a jury trial.
- ❖ The law does not conclude whether the respondent has a right to remain silent and does not mandate him to participate in a court-ordered examination.
- ❖ The statute does not provide for a provision that compromises the possibility that disclosures about sex offending behaviors during treatment will not be used against the offender by the government to pursue commitment.
- ❖ The AWA does not resolve discovery procedures.

- ❖ The Act does not distinguish whether attorneys should incorporate the Federal Rules of Criminal Procedure.
- ❖ The AWA does not provide for a probable cause determination for proceedings.
- ❖ The statute does not mandate a time-frame for the courts to consider evidence and begin hearings, and does not allow for a bail provision while offenders are awaiting hearings on the merits.
- ❖ The law does not provide for annual reviews and examinations.
- ❖ The AWA does not describe procedures before the offender is released.
- ❖ The statute allows for the indefinite commitment pursuant to traditional commitment law under 18 U.S.C. § 4248.
- ❖ The AWA does not delineate least restrictive treatment/placement alternatives.

### **Hendricks and Crane**

It is imperative for any attorney who participates in sexually violent predator (SVP) civil commitment hearings to be thoroughly acquainted with the U.S. Supreme Court's opinions in *Kansas v. Hendricks*<sup>22</sup> and *Kansas v. Crane*.<sup>23</sup> These decisions upheld the civil commitment of SVPs.

Leroy Hendricks had a long history of sex offenses against boys and girls, and was plagued with paraphilic sexual deviancy disorders (pedophilia traits of exhibitionism). He admitted to being unable to control his urge to molest children, and he refused to participate in sex offender treatment. In *Hendricks*,<sup>24</sup> the Court upheld a Kansas law providing for the civil commitment of sex offenders who: (1) engaged in harmful predator sexual offending in the past; (2) currently suffer from a *mental abnormality* (including a mental illness and/or personality disorder; and (3) because of this mental abnormality, will likely engage in future predatory acts of harmful sexual reoffending.<sup>25</sup>

The U.S. Supreme Court ruled that the Kansas SVP commitment law did not violate the substantive Due Process requirements and had a treatment rather than punitive purpose, thus not violating the Double Jeopardy Clause or Ex Post Facto Clause of the U.S.

Constitution.<sup>26</sup> The Court reasoned that the goal of the statute was not retributive in endorsing culpability for prior criminal conduct, nor was it deterrent in nature, as such offenders with mental abnormalities or personality disorders usually cannot be deterred. The law did not have a retroactive effect by criminalizing conduct that was legal before the statute's enactment. Rather, it permitted confinement based on the finding that a person currently suffers from a mental abnormality or personality disorder and is dangerous to the public.<sup>27</sup> The Court pointed out that in certain narrow circumstances states have provided for the forcible civil detainment of people who are unable to control their behavior and who thereby pose a danger to the public.<sup>28</sup> Further, the indefinite commitment provision was not punitive, rather it related to the law's goal of detaining offenders until their mental abnormality no longer leaves them a threat to others.<sup>29</sup>

Importantly, the Court supported the *legal* definition of "mental abnormality" and "personality disorder" as satisfying "substantive" due process requirements narrowing offenders eligible for confinement to those who are unable to control their dangerousness.<sup>30</sup> The Court's dissenters noted that the law's objective was punishment-based since offenders were offered and committed to treatment after they were punished and served prison sentences.

In *Kansas vs. Crane*, the U.S. Supreme Court was asked to elaborate on the Kansas statute's definition of "mental abnormality" and its relationship to volitional impairment and future sexual dangerousness, as the holding in *Hendricks* set forth no formal requirement for total or complete lack of control over an individual's propensity to commit sexual offenses. There must be proof of serious difficulty in controlling behavior. And this, the Court said, when considering the "nature" and "severity" of the mental disorder, must be sufficient to distinguish the dangerous sexual offender whose serious mental illness, abnormality, or disorder subjects him to civil commitment from the dangerous but typical recidivist considered in an ordinary criminal case.

The Kansas statute's definition of "mental abnormality" included a congenital or acquired condition affecting the emotional or volitional capacity that predisposes the person to commit sexually violent offenses in a degree constituting such person a menace to the

health and safety of others.<sup>31</sup>

Michael Crane, unlike Leroy Hendricks, suffered from an antisocial personality disorder and traits of exhibitionism. Crane argued that the state statute would not allow his commitment unless the state proved he was unable to control his sexually dangerous behavior.<sup>32</sup> Crane argued that there needed to be a volitional impairment when a person's mental disorder is a personality disorder rather than a mental abnormality.

The Court's majority required the prosecution to prove that the mental abnormality (usually a paraphilic sexual deviancy disorder) and/or antisocial personality disorder caused the offender to have "serious difficulty in controlling his sexual behavior,"<sup>33</sup> rather than "total or complete lack of control."<sup>34</sup> This distinction is a key issue to the evaluation of sexual dangerousness.

## A Sampling of State SVP Civil Commitment Statutes

In the spring of 2007, New York became the 18th state to initiate sex offender civil commitment legislation for sex offenders.<sup>35</sup> Table 1 includes a sampling of state SVP statutes, their definitions of a sexually violent predator, and definitions of the criteria for mental abnormality.

There is no question that the goal of these civil commitment statutes is to identify a small but extremely dangerous group of sexual predators who do not have a traditional mental disease or defect that renders them appropriate candidates for involuntary civil commitment. Further, although the ultimate goal of these statutes may be to treat and perhaps cure these individuals, the immediate purpose is to ensure

their commitment in order to protect society.<sup>36</sup> The *Hendricks* opinion emphasized the importance of distinguishing the dangerous but typical sex offender from the ones who should be civilly committed. In contrast to traditional involuntary civilly committed offenders who carry diagnoses such as schizophrenia or bipolar disorder, SVP civil commitment laws focus on sexual offenders who have sexually deviant paraphilia disorders and/or antisocial personality disorder features that are not amenable to traditional mental health treatment modalities and whose recidivism rates are very high.

These five state statutes contain similarities in their definitions of sexually violent predators who qualify under the statute. They include, however, "likely" and "substantial probability" components of sexual recidivism

**Table 1**

Statutory Definitions in Civil Commitment Laws			
State	State statute	Label used and definition	Disorder or abnormality
AZ	Sexually violent persons, A.R.S. § 36-3701	Sexually violent person: "... (a) has ever been convicted of or found guilty but insane of a sexually violent offense or was charged with a sexually violent offense and was determined incompetent to stand trial; (b) has a mental disorder that makes the person likely to engage in acts of sexual violence."	Mental disorder: "... a paraphilia, personality disorder or conduct disorder or any combination of paraphilia, personality disorder and conduct disorder that predisposes a person to commit sexual acts to such a degree as to render the person a danger to the health and safety of others."
CA	Sexually violent predators, Cal Wel & Inst Code § 6600	Sexually violent predator: "... a person who has been convicted of a sexually violent offense against one or more victims and who has a diagnosed mental disorder that makes the person a danger to the health and safety of others in that it is likely that he or she will engage in sexually violent criminal behavior."	Mental disorder: "... a congenital or acquired condition affecting the emotional or volitional capacity that predisposes the person to the commission of criminal sexual acts in a degree constituting the person a menace to the health and safety of others."
FL	Involuntary civil commitment of sexually violent predators, Fla. Stat. § 394.910	Sexually violent predator: "... any person who: (a) has been convicted of a sexually violent offense; and (b) suffers from a mental abnormality or personality disorder that makes the person more likely to engage in acts of sexual violence if not confined in a secure facility for long-term control, care, and treatment."	Mental abnormality: "... a mental condition affecting a person's emotional or volitional capacity which predisposes the person to commit sexually violent offenses."
IL	Sexually Violent Persons Commitment Act, § 725 ILCS 207/1	Sexually violent person: "... a person who has been convicted of a sexually violent offense, has been adjudicated delinquent for a sexually violent offense, or has been found not guilty of a sexually violent offense by reason of insanity and who is dangerous because he or she suffers from a mental disorder that makes it substantially probable that the person will engage in acts of sexual violence."	Mental disorder: "... a congenital or acquired condition affecting the emotional or volitional capacity that predisposes a person to engage in acts of sexual violence."
IA	Commitment of sexually violent predators, Iowa Code § 229A.1	Sexually violent predator: "... a person who has been convicted of or charged with a sexually violent offense and who suffers from a mental abnormality which makes the person likely to engage in predatory acts constituting sexually violent offenses, if not confined in a secure facility."	Mental abnormality: "... a congenital or acquired condition affecting the emotional or volitional capacity of a person and predisposing that person to commit sexually violent offenses to a degree that would constitute a menace to the health and safety of others."

that the AWA lacks. Further, the definitions of mental abnormality are quite similar between the states' versions and the AWA criteria. The AWA statute simply relies upon the *Crane* holding associated with volitional impairments and recidivism, "serious difficulty refraining from sexually violent conduct or child molestation."

## Legal Definitions for Psychiatric Terms

The holdings in *Hendricks* and *Crane* gave legislatures expansive authority to define classes of offenders (sex offenders) to be civilly committed to protect the community because they suffer from a mental condition impairing the ability to control their behavior.<sup>37</sup> Critically, these opinions did not limit civil commitment to people suffering from mental illnesses that are only recognized by mental health professionals, rather mental illness became a political and legal decision.<sup>38</sup>

"Mental abnormality' is a nonmedical definition of what purports to be a clinical condition that usurps psychiatric terminology to achieve a social and political result."<sup>39</sup> Experts, and often lawyers representing the civil respondent (former criminal defendant), argue how widely some psychiatric diagnoses are accepted and debate the interrater reliability among experts relating to how accurately and consistently examiners diagnose and come to similar conclusions. Others say that an offender's diagnostic category is not directly relevant because legal mental illness addresses the relationship between the individual's psychological impairment and the legal criteria for eligibility of commitment, rather than between the impairment and the criteria for clinical diagnostic categories.<sup>40</sup> Despite its vagueness, courts will cite the statute's standards and definitions as sufficient in providing guidance, and they will also support clinician's meanings of the legal term "mental abnormality" within a clinical psychological context.<sup>41</sup>

Courts will likely accept any psychiatric diagnosis that is recognized in the "medical or psychiatric literature."<sup>42</sup> Diagnoses often considered in sex offender commitment cases, such as a sexual deviance disorder (pedophilia) and a personality disorder, notably antisocial personality disorder, are recognized in the field of mental health and they are listed in the *Diagnostic and Statistical Manual for Mental Disorders* (DSM-IV).<sup>43</sup> Further, courts usually

accept psychopathy (severe criminal personality) as a widely accepted clinical construct qualifying for a legal mental disorder even if it is not listed in the DSM-IV-TR, as it does appear in the psychological and psychiatric literature. Critically, there is heated debate and evidence suggesting the extreme differences in assessments of psychopathy between government and defense experts, indicating that there is little reliability of the assessment of psychopathy between adversarial experts.<sup>44</sup>

Critics note that the term "mental abnormality" is not listed in the DSM, and therefore it is unrecognized and not sufficient to justify civil commitment, yet they seem to ignore the fact that insanity is not listed in the psychiatric manual either.<sup>45</sup> Although experts may be resistant and resent legal infringements on their clinical expertise, the courts define legal mental abnormality as they see fit. In fact, the Court in *Hendricks* recognized that "mental illness" is devoid of any talismanic significance as "psychiatrists disagree widely and frequently on what constitutes mental illness."<sup>46</sup> The Court opined, "[I]f it were shown that mental abnormality is too imprecise a category to offer a solid basis for concluding that civil detention is justified, our precedents would not suffice to validate it."<sup>47</sup>

Courts have always, and will always, incorporate various clinical descriptions when describing a mental condition relevant to legal mental abnormality and civil commitment.<sup>48</sup> What is critical is that psychiatric and psychological clinicians who testify in good faith as to mental abnormality are able to identify psychiatric disorders that are defined in the DSM-IV.

Crucial to the sex offenders who are being considered for civil commitment, a finding of legal "mental abnormality" will primarily encompass the following psychiatric conditions: (1) pedophilia, (2) paraphilia not otherwise specified (nonconsenting), (3) antisocial personality disorder, and (4) the clinical construct of psychopathy.

It is important to note that the AWA includes *mental illness, abnormality, or disorder*, which simply encompasses any of the above disorders and includes any psychiatric or psychological disorder and condition that is recognized in the medical, psychiatric, and psychological literature.

Part Two of this article will break down these four clinical diagnoses in more detail pursuant to their role (prevalence, acceptance, and connection

with sexually violent behavior) in civil commitment proceedings.

## How Do We Define Likely?

All state civil commitment statutes include a "likely" to reoffend component. The AWA does not. Rather, the law incorporates a volitional mandate. This is a critical distinction. As we have seen, in *Crane* the Court ruled that a potential sex offender being considered for commitment need only be found to have a mental abnormality or disorder that makes it "difficult, if not impossible, for the dangerous person to control his dangerous behavior."<sup>49</sup> The Court held that the SVP standard required a substantial loss of volitional impairment, rather than a total loss of control because the latter could not be demonstrated with mathematical precision.<sup>50</sup>

Instead of including a "likely" component of future sexual dangerousness, the AWA's definition includes "serious difficulty refraining from sexually violent conduct or child molestation if released." How does a court or jury consider defining a sex offender's volitional impairments and inability to control or refrain from sex offending? Should we assume that this difficulty refraining from sexually violent conduct indicates that an offender is *likely* commit future sex offenses? If so, how do we define *likely*? If the *Crane* court questions mathematical precision in assessing inability to control, should expert witnesses incorporate mathematically based actuarial risk assessment instruments in their sex offender assessments pursuant to AWA commitment hearings?

The AWA does not require the use of these instruments to assess risk of future sex offenses as some state statutes require, instead it only requires the offender qualify for a condition as a sexually dangerous person. Subsequently, many experts might simply rely on diagnoses of paraphilias and/or antisocial personality disorder to describe the offender as having *serious difficulty in refraining from acts of sexual violence*, rather than utilizing sophisticated and complex risk assessment instruments that are statistically and empirically driven.

When considering the "likely" versus "serious difficulty controlling" debate, the AWA legislative intent was probably aimed at considering the volitional impairment requirement in *Crane*. Interestingly, the consequences of incorporating an "inability to control" standard rather than a "likely" standard

will lead to heightened psycholegal debates in court about the ability of experts to assess freewill and volitional aspects of human behavior. The assessment of likelihood of sexual recidivism has incorporated the science of actuarial and statistical risk assessment that appears more objective in derivation than theories on human behavior. A formal discussion on the derivation, applications, and admissibility of these instruments will follow in Part Two.

If federal courts consider the notion of “likely” to reoffend, how will they define such qualification? Consistently, courts do not recognize a definition of “more likely than not.” Rather, they encourage a contextual analysis of risk of harm based on the particular facts of the case.<sup>51</sup>

Many courts have not translated “likely” into a statistical probability.<sup>52</sup> Instead, courts have understood this word to mean “highly probable”<sup>53</sup> or “substantial danger and serious and well-founded risk.”<sup>54</sup> They even have distinguished between likelihood of recurrence of sexual misconduct, the likely frequency of any such behavior, and the magnitude of harm to other persons that is likely to result.<sup>55</sup> In contrast, some states that incorporate “likely” may use a 51 percent criterion. For example, the statutory language in Missouri reads, “more likely than not to engage in sexual violence if not confined.”<sup>56</sup> Other states, however, are less specific. Illinois includes the phrase “substantially probable that the person will engage in acts of sexual violence” in its statute.<sup>57</sup>

Accordingly, the AWA may have avoided using terms such as “likely” and “substantial probability” because they do not lend themselves to percentages or numerical exactness.

When considering the AWA’s *serious difficulty in refraining from acts of sexual violence* language, lawyers and experts must turn to the literature and case law addressing volitional impairment and even irresistible impulse. Notably, in light of the John Hinckley trial, the American Bar Association (ABA)<sup>58</sup> and the American Psychiatric Association (APA) advocated for the abolition of the American Law Institute’s (ALI) volitional insanity prong. The APA stated that the “line between an irresistible impulse and an impulse not resisted is probably no sharper than the line between twilight and dusk.”<sup>59</sup> The ABA criticized volitional tests by noting there is no valid or reliable basis for measuring incapacity for self-control.

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Volitional statutory mandates lead to psychiatric disagreement and error since there is “no way to calibrate the degree of impairment of behavioral controls.”<sup>60</sup> Critics argue that the *Crane* Court’s “serious difficulty” rule assumes that people have free will, yet one author asserts, “the science of the mind simply has not advanced far enough to permit experts to know with any confidence what decisions were ‘controllable’ and which ones were not.”<sup>61</sup>

When considering whether an offender has a “serious difficulty refraining from sexually violent conduct or child molestation if released,” the Bureau of Prisons indicates in 28 C.F.R. Part 549.95 that a mental health professional may consider (but is not limited to) any evidence:

- ❖ Of the person’s repeated contact, or attempted contact, with one or more victims;
- ❖ Of the person’s denial of or inability to appreciate the wrongfulness, harmfulness, or likely consequences of engaging in sexually violent conduct or child molestation;
- ❖ Established through interviewing and

testing of the person, or other risk assessment tools, that are relied upon by mental health professionals;

- ❖ Established by forensic indicators of inability to control conduct, such as:

- (a) offending while under supervision
- (b) engaging in offense(s) when likely to get caught
- (c) statement(s) of intent to reoffend, or
- (d) admission of inability or difficulty to control behavior; or

- ❖ Indicating successful completion of, or failure to complete, a sex offender treatment program.

The preceding elements may begin to assist in defining one’s inability to refrain from sexual offending; however, they fail to fully answer the question identifying and defining volitional impairment and inability to control because these premises lack a clear conception of what we are trying to measure and identify.<sup>62</sup> A further discussion on

the psycholegal assessment of volition will follow in Part Two.

## Wide-Ranging Effects For Sex Offenders

The Adam Walsh Act may limit the degree and breadth that forensic psychological and psychiatric examiners can contribute due to its avoidance of a “likely” to reoffend requirement. The law also defines a sexually dangerous person as one “who has engaged or attempted to engage in sexually violent conduct or child molestation and who is sexually dangerous to others.”

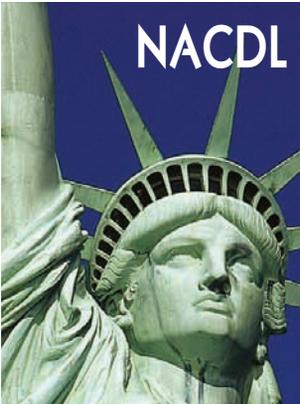
Critical to the language of the AWA is the fact that many federal sex offenders have one or more hands-off non-contact offenses in their history, i.e., solicitation and/or possession of pornography, yet do not have any formal violent hands-on, contact sex offenses. Consequently, a one-time sex offender who attempted to solicit a federal agent for sex, believing she was 13 years old, can be defined as “attempting to engage in sexually violent conduct or child molestation” and be deemed sexually dangerous to others. This offender, however, would not likely be considered as having a serious difficulty in refraining from acts of sexual violence. In contrast, a repeat pornography possessor who has no hands-on sexual offenses, and who may have attempted to solicit another with intent of a contact sex offense, could potentially be committed indefinitely without ever physically assaulting anyone.

The AWA has wide-ranging effects for federal sex offenders, and it presents serious constitutional questions and concerns. Sex offenders who suffer from any type of mental illness, disorder, or abnormality may be committed under the AWA if they have volitional impairments and serious difficulties in controlling behavior that ultimately lead to sexually violent acts in line with the *Crane* opinion.

## Notes

1. For helpful reviews on the federal civil commitment law for sex offenders under the Adam Walsh Act, see Amy Baron-Evans & Sara Noonan, *The Adam Walsh Act: Civil Commitment, Bail and Discovery Provisions — Part One*, THE CHAMPION, July 2008 at 58. See Amy Baron-Evans & Sara Noonan, *Adam Walsh Act III: It’s Not the Sentence, It’s the Commitment*, available at [http://www.fd.org/odstb\\_AdamWalsh.htm](http://www.fd.org/odstb_AdamWalsh.htm).

2. J.M. Fabian, *Kansas v. Hendricks*,



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*Crane and Beyond: 'Mental Abnormality,' and 'Sexual Dangerousness': Volitional vs. Emotional Abnormality and the Debate Between Community Safety and Civil Liberties*, 29 WM. MITCHELL L. REV. 1367 (2003).

3. Personal communication with Jill Beeler, assistant public defender, Ohio Public Defender's Office.

4. See 18 U.S.C. § 1201(a)(1).

5. Ian Friedman & Kristina Walter, *How the Adam Walsh Act Restricts Access to Evidence*, THE CHAMPION, January/February 2007 at 12. See 18 U.S.C. 3509(m).

6. 18 U.S.C. § 3621(f)(1).

7. Jimmy Ryce State Civil Commitment Programs for Sexually Dangerous Persons.

8. 72 Fed. Reg. 43205 (August 3, 2007).

9. Amy Baron-Evans & Sara Noonan, *The Adam Walsh Act: Civil Commitment, Bail and Discovery Provisions — Part One*, THE CHAMPION, July 2008 at 58.

10. 18 U.S.C. § 4247 (a)(5)-(6).

11. *Id.*

12. 72 Fed. Reg. 43205 (August 3, 2007).

13. 72 Fed. Reg. at 43207.

14. 72 Fed. Reg. at 43206.

15. 18 U.S.C. § 2241(a)-(c) requiring the defendant to act knowingly.

16. 18 U.S.C. § 2241(a)-(c) requiring a sexual act, § 2246 (2)(A)-(D) defining sexual act to include certain types of penetration, oral contact, and unclothed touching of victims 15 or younger.

17. 72 Fed. Reg. at 43207.

18. See Baron-Evans & Noonan, *supra* note 9.

19. 18 U.S.C. § 4247(b), (c).

20. 18 U.S.C. § 4247(d).

21. *Id.*

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

23. *Kansas v. Crane*, 534 U.S. 407 (2002).

24. KAN. STAT. ANN. § 59-2902 (B).

25. The Kansas Sexually Violent Predator Act, KAN. STAT. ANN. 59-2902 (1996).

26. J.M. Fabian, *Kansas v. Hendricks, Crane and Beyond: 'Mental Abnormality,' and 'Sexual Dangerousness': Volitional vs. Emotional Abnormality and the Debate Between Community Safety and Civil Liberties*, 29 WM. MITCHELL L. REV. 1367 (2003).

27. *Kansas v. Hendricks*, 521 U.S. at 371.

28. *Id.* at 357.

29. *Id.* at 363.

30. *Id.* at 356, 358.

31. KAN. STAT. ANN. 59-2902(b).

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

33. *Kansas v. Crane*, 534 U.S. 407 (2002).

34. *Crane*, 534 U.S. at 410-411.

35. NY CLS MENTAL HYG. § 10.03 (2007).

36. *In re Young*, 857 P.2d 989 (Wash. 1993).

37. *Hendricks*, 521 U.S. at 359.

38. J. Q. LAFOND, PREVENTING SEXUAL

VIOLENCE: HOW SOCIETY SHOULD COPE WITH SEX OFFENDERS (2005); Robert Schopp & Barbara Sturgis, *Sexual Predators and Legal Mental Illness for Civil Commitment*, 27 BEHAV. SCI. & L. 437-458 (1995) (sexual predator statutes and civil commitment statutes fail to provide criteria of eligibility generating an appropriate conception of legal mental illness).

39. New York State Psychiatric Association, position statement on Sexually Violent Predators Civil Commitment Legislation, available at <http://www.nyspsych.org/public/components/societytools/admin/viewNewnews.asp?newsjob=ArticleID&ArticleID=6922&ArticleName=Position+Statement+on+Sexually+Violent+Predators+Civil+Confinement+Legislation>.

40. Robert Schopp & Barbara Sturgis, *Sexual Predators and Legal Mental Illness for Civil Commitment*, 27 BEHAV. SCI. & L. 437, 446 (1995).

41. 857 P.2d 989, 1001 (Wash. 1993); See Karol Lucken & Jessica Latina, *Sex Offender Civil Commitment Laws: Medicalizing Deviant Sexual Behavior*, 3 BARRY L. REV. 15 (2002); Robert Wettstein, *A Psychiatric Perspective on Washington's Sexually Violent Predators Statute*, 15 U. PUGET SOUND L. REV. 597 (1992).

42. Transcript of Oral Argument, *Hendricks*, 1996 U.S. Trans. LEXIS 80 at pp. 20-22.

43. AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (4th ed., text rev.) (2000).

44. D. Murrie, M. Boccaccini, J. Johnson, & C. Janke, *Does Interrater (Dis)agreement on Psychopathy Checklist Scores in Sexually Violent Predator Trials Suggest Partisan Allegiance in Forensic Evaluations?* 32 LAW & HUM. BEHAV. 352 (2008).

45. G. Hamilton, *The Blurry Line Between 'Made' and 'Bad': Is 'Lack-Of-Control' a Workable Standard for Sexually Violent Predators?* 36 U. RICH. L. REV. 481, 491 (2002).

46. *Hendricks*, 521 U.S. at 358-359.

47. *Hendricks*, 521 U.S. at 373.

48. The Washington State Supreme Court addressed this psycho-legal debate elaborately in *In Re Young*, 857 P.2d 989 (Wash. 1993). The court held that over the years, the law has developed many specialized terms to describe mental health concepts. The legal definitions of "insanity" and "commitment" vary substantially from their psychological and psychiatric counterparts. In using the concept of "mental abnormality" the legislature has invoked a more generalized terminology that can cover a much larger variety of disorders.

49. *Crane*, 534 U.S. at 358.

50. *Crane* at 413.

51. *Commonwealth v. Boucher*, 780 N.E.2d 47 (2002).

52. *Boucher*, 780 N.E.2d at 49.

53. *In re Wilber W.*, 53 P.3d 1145 (2002).

54. *People v. Superior Court (Ghilotti)*, 44 P.3d 949 (2002).

55. *Cross v. Harris*, 418 F.2d 1095 (1969).

56. MO. REV. STAT. 632.480.

57. 725 ILL. COMP. STAT. 207/15 (2004).

58. AMERICAN BAR ASSOCIATION, MODEL CODE OF PROFESSIONAL CONDUCT (1983).

59. American Psychiatric Association statement on the insanity defense, 140 AM. J. PSYCHIATRY 681-688 (1983).

60. R.J. Bonnie, *Morality, Equality, and Expertise: Renegotiating the Relationship Between Psychiatry and the Criminal Law*, 12 BULLETIN OF THE AMERICAN ACADEMY OF PSYCHIATRY AND LAW 5, 17 (1984); see ROBERT SCHOPP, *AUTOMATISM, INSANITY, AND THE PSYCHOLOGY OF CRIMINAL RESPONSIBILITY* (1991); Stephen Morse, *Culpability and Control*, 142 U. PA. L. REV. 1587 (1994).

61. David Faigman, *Making Moral Judgments Through Behavioural Science: The 'Substantial Lack of Volitional Control' Requirement in Civil Commitments*, LAW, PROBABILITY, AND RISK (2003).

62. Robert Schopp, Mario Scalora & Marc Pearce, *Expert Testimony and Professional Judgment: Psychological Expertise and Commitment as a Sexual Predator After Hendricks*, 5 PSYCHOL. PUB. POL'Y & L. 120, 147. ■

## About the Author

Dr. John Matthew Fabian, PSY.D., J.D., ABPP,



is board certified in both forensic and clinical psychology. He has a national practice specializing in criminal forensic psychological and neuropsychological evaluations including competency to stand trial, insanity, death penalty, sexually violent predator civil commitment, Internet pornography/solicitation, and juvenile transfer/waiver examinations. Dr. Fabian has previously worked in court psychiatric clinics and state and federal forensic psychiatric settings. He has testified in courts throughout the United States. In addition to teaching courses in forensic psychology and the law, he has published articles in law review, peer review, and bar journals.

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