# The Need for Coherence: States' Civil Commitment of Sex Offenders in the Wake of *Kansas v. Crane*

Peter C. Pfaffenroth*



* J.D., with distinction, Stanford Law School, 2003; A.B., magna cum laude, Princeton University, 1997; Executive Editor, *Stanford Law Review*, Volume 55; Law clerk for the Honorable Judith Rogers, United States Court of Appeals for the District of Columbia Circuit, 2003-2004. I would like to thank Bob Weisberg, Tom Nolan, Adam Gogolak, Brendan Peters and his editing team, and especially my wife, Sonia, for their helpful comments.

## INTRODUCTION

> In the case of absolute madmen, as they are not answerable for their actions, they should not be permitted the liberty of acting unless under proper control; and, in particular, they ought not to be suffered to go loose, to the terror of the king's subjects. It was the doctrine of our antient [sic] law, that persons deprived of their reason might be confined till they recovered their senses.[1]

Ten minutes after she had shown him to a private tanning room, Michael Crane approached the salon attendant, dropped his pants, began masturbating, and said, "You know you want it."[2] When the attendant reached for the phone and told him to get away, Crane said, "You could have had this," and walked out the door.[3]

Half an hour later, Crane asked the woman working the desk at a nearby video store for help finding a movie.[4] After an unsuccessful hunt, she returned to the desk and became engrossed in the film showing on the store's monitors. Next thing she knew, Crane was carrying her across the store with his sweatpants down and ordering her to perform fellatio. He squeezed the clerk's neck, trying to force her down. But the clerk fought back, screaming and kneeing Crane in the groin. He pushed her to the ground, hovered over her, and said, "I'm going to rape you." But suddenly, without any intervening event, Crane stopped and ran away.[5]

A psychiatrist evaluated Crane and found evidence of sexual dysfunction and deviancy in the form of exhibitionism. He testified at trial that people like Crane "want to induce some kind of shock or fear in the individual and there is also a sort of an adrenaline rush or boost of being in a dangerous situation."[6] Sometimes they need to do more than just expose themselves in order to get the fearful response they crave, the doctor reported. Such behavior serves as a stress-release, and, though voluntary, is "a bit like an addiction," which exhibitionists later use for masturbatory fantasies.[7]

1. 4 WILLIAM BLACKSTONE, COMMENTARIES *25.
2. State v. Crane, 918 P.2d 1256, 1258 (Kan. 1996).
3. *Id.*
4. *Id.* at 1259.
5. *Id.*
6. *Id.*
7. *Id.*

A jury found Crane guilty of kidnapping, attempted aggravated sodomy, attempted rape, and lewd and lascivious behavior. He was sentenced to thirty-five years to life in prison.[8]

The convictions did not stick, however. The Kansas Supreme Court threw out the kidnapping conviction, rejecting the prosecutor's theory by finding that moving the video store clerk across the room lacked "significance."[9] The court also reversed the attempted sodomy and attempted rape charges because the prosecutor had failed to specifically allege the elements of the crimes in the complaint.[10] Only the lewd and lascivious behavior conviction, stemming from the tanning salon incident, survived.[11]

Rather than risk a retrial, the prosecutor accepted Crane's guilty plea to aggravated sexual battery, for which Crane was essentially sentenced to time served—about four years.[12] But just days after his release from prison, the prosecutor moved for Crane's indefinite civil commitment as a sexually violent predator (SVP) under the Kansas Sexually Violent Predator Act (the "Act").[13]

At Crane's commitment trial, the video store victim testified that she was upset that Crane was not serving enough time, and the prosecutor established for the jury that Crane's punishment had been slashed from thirty-five years to life to just four years.[14] The prosecutor explained that the kidnapping charge could not be refiled on account of a "technicality," despite the Kansas Supreme Court's explicit denunciation of the evidence supporting the charge as "inconsequential."[15] At the commitment trial, the victim responded affirmatively to the prosecutor's question, "[U]nderstandably, you're very upset about how the system treated you in this case, right?"[16] The victim testified that the prosecutor had persuaded her that accepting the guilty plea, and then seeking civil commitment based on that conviction, was the only way to "make sure [Crane] stays off the street."[17]

Crane argued that for him to be committed, the jury must find that he was unable to control his exhibitionism.[18] However, the trial court held as a matter

8. *Id.* at 1258.

9. *Id.* at 1273.

10. *Id.* at 1269. The court found that the complaint denied Crane his procedural due process rights and violated his right to be informed of the charges against him, because the complaint was so "fatally defective" that he was not made aware of the nature of the crimes against which he had to defend himself. *Id.* at 1267, 1269.

11. *Id.* at 1274.

12. *In re* Crane, 7 P.3d 285, 286, 287 (Kan. 2000).

13. Tony Rizzo, *Man's Violent Past Leads to Confinement*, KAN. CITY STAR (Johnson County ed.), Aug. 14, 1998, at C1; *see* KAN. STAT. ANN. §§ 59-29a01 to -29a20 (2003).

14. *In re Crane*, 7 P.3d at 287.

15. *Id.*; State v. Crane, 918 P.2d at 1273.

16. *In re Crane*, 7 P.3d at 287.

17. *Id.*

18. *Id.*

of law "that even though the State's expert witnesses might agree that [Crane's] mental disorder does not impair his volitional control to the degree he cannot control his dangerous behavior, [the Act] does not specify such a required element to be proven."[19] Instead, the State only had to "prove (1) that Crane had been convicted of aggravated sexual battery, and (2) that he suffers from a mental abnormality or personality disorder which makes the respondent likely [defined as 'more probable . . . than not'] to engage in future predatory acts of sexual violence, if not confined in a secure facility."[20]

After ninety minutes of deliberation, the jury voted unanimously to commit Michael Crane to Larned State Security Hospital indefinitely.[21]

After languishing for decades, laws permitting the involuntary civil commitment of sex offenders have regained popularity. In 1997, the United States Supreme Court upheld the constitutionality of the Act in *Kansas v. Hendricks*.[22] However, just five years later, the Court last Term in *Kansas v. Crane* expressed serious doubts about the Act and its implementation.[23] Writing for a seven-Justice majority, Justice Breyer held that, although a complete lack of volitional control need not be proved, the Constitution requires that there be some lack-of-control finding in a civil commitment proceeding.[24] Nonetheless, the Court failed to enunciate any clear standard for states to follow and gave them little guidance on how to implement its holding. As a result, the Court's decision in *Crane* will likely lead to few changes in the process of civil commitment following criminal conviction.

Most fundamentally, these civil commitment statutes, which are based on predictions of future dangerousness and which may facilitate the indefinite incapacitation of even those who can largely control their behavior, threaten to redefine how states punish criminals. Defendants like Michael Crane—who have perpetrated despicable acts, but who have served their sentences and can essentially choose not to recidivate—should neither be incapacitated a second

19. *Id.* at 288.

20. *Id.*

21. Rizzo, *supra* note 13.

22. 521 U.S. 346 (1997). Fifteen other states have passed laws substantially identical to the Kansas Act. *See* ARIZ. REV. STAT. § 36-3701 (2003); CAL. WELF. & INST. CODE § 6600 (West 2003); FLA. STAT. ch. 394.910 (2003); 725 ILL. COMP. STAT. 207/1 (2003); IOWA CODE § 229A.1 (2003); MASS. ANN. LAWS ch. 123A, § 1 (Law. Co-op. 2003); MINN. STAT. § 253B.185 (2003); MO. REV. STAT. § 632.480 (2003); N.J. STAT. ANN. § 30:4-27.25 (West 2003); N.D. CENT. CODE § 25-03.3-01 (2003); S.C. CODE ANN. § 44-48-100 (Law. Co-op. 2003); TEX. HEALTH & SAFETY CODE ANN. § 841.081 (Vernon 2003); VA. CODE ANN. § 37.1-70.6 (Michie 2003); WASH. REV. CODE § 71.09.010 (2003); WIS. STAT. § 980.01 (2003). The statements and arguments made in this Note also apply in most cases to the other states with such statutes.

23. 534 U.S. 407 (2002).

24. *Id.* at 412.

time for the same offense, nor institutionalized out of fear that they might in the future again decide to commit a crime.

This Note assesses the current state of sex offender civil commitment laws and argues that states must improve the logical consistency between their dual criminal and civil efforts to confine sex offenders. Part I explains the history of these statutes and the constitutional constraints on institutionalization. Part II addresses the Supreme Court's decision in *Crane*. Part III weighs states' implementation of post-*Crane* practices. Part IV discusses the dangers of overly broad civil commitment statutes. Finally, Part V argues for several solutions to the dilemmas posed by civil commitment laws.

## I. THE DEVELOPMENT OF SEX OFFENDER COMMITMENT LAWS

### A. *Legal Justifications for General Civil Commitment Statutes*

Civil commitment has a long tradition in the United States. In 1880, the New Hampshire Supreme Court summarized the relevant common law:

> [I]t is lawful to seize and restrain any person incapable of controlling his own actions, whose being at large endangers the safety of others. But this is justifiable only when the urgency of the case demands immediate intervention. The right to exercise this summary remedy has its foundation in a reasonable necessity, and ceases with the necessity.[25]

Since then, the United States Supreme Court has upheld civil commitment, so long as it is "pursuant to proper procedures and evidentiary standards."[26] Under current law, mentally ill individuals may be committed when, because of their illness, either they can reasonably be expected to seriously injure themselves or others in the near future, or they cannot attend to their basic physical needs, such as feeding, clothing, and sheltering themselves.[27] They must be periodically evaluated, since they are entitled to release when "they are no longer 'mentally ill,' 'dangerous,' or 'in need of care or treatment.'"[28]

A state may constitutionally institutionalize an individual only if a special justification, such as the threat posed by him, outweighs his liberty interest.[29]

> [T]he Due Process Clause contains a substantive component that bars certain arbitrary, wrongful government actions "regardless of the fairness of the procedures used to implement them." Freedom from bodily restraint has

25. Keleher v. Putnam, 60 N.H. 30, 31 (1880) (ruling in favor of an insane person's liberty interest, by holding that an official may not detain her if she does not pose a threat).

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

27. RALPH SLOVENKO, PSYCHIATRY AND CRIMINAL CULPABILITY 181 (1995); *see also* Heller v. Doe, 509 U.S. 312, 325 (1993) (unable to care for self); Jones v. United States, 463 U.S. 354, 360 (1983) (criminally irresponsible or incompetent); Minnesota *ex rel.* Pearson v. Probate Court, 309 U.S. 270, 273 (1940) (unable to control own behavior).

28. SLOVENKO, *supra* note 27, at 181.

29. Zadvydas v. Davis, 533 U.S. 678, 690 (2001).

> always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action. "It is clear that commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection."[30]

Courts therefore engage in the familiar balancing exercise. Only "special and 'narrow' non-punitive 'circumstances'" may trump an individual's liberty interest in a civil commitment case.[31] "A finding of dangerousness, standing alone, is ordinarily not a sufficient ground upon which to justify indefinite involuntary commitment."[32] Moreover, a state may only overcome a person's liberty interest where it demonstrates that the "nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed."[33] Still, "[t]here are manifold restraints to which every person is necessarily subject for the common good. On any other basis organized society could not exist with safety to its members."[34]

There have traditionally been two bases of authority underlying civil commitment: a state's police power, used in order to protect society against the narrow class of people who are most acutely threatening,[35] and its *parens patriae* interest in preserving and promoting the welfare of an individual.[36] Under the police power,

> [s]tates have in certain narrow circumstances provided for the forcible civil detainment of people who are unable to control their behavior and who thereby pose a danger to the public health and safety. . . . It thus cannot be said that the involuntary civil confinement of a *limited subclass* of dangerous persons is contrary to our understanding of ordered liberty."[37]

The purpose of civil commitment here is not punishment, but rather the protection of society "from [the individual's] potential dangerousness."[38]

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30. Foucha v. Louisiana, 504 U.S. 71, 80 (1992) (citations omitted) (invalidating a statute that permitted the state to civilly confine an insanity acquittee found to be dangerous, whether or not he suffered from a mental illness).

31. *Zadvydas*, 533 U.S. at 690 (citing *Foucha*, 504 U.S. at 80).

32. Kansas v. Hendricks, 521 U.S. 346, 358 (1997). Kansas previously permitted commitment for dangerousness alone, but this was invalidated by the Court's decision in *Foucha*. *See* SLOVENKO, *supra* note 27, at 192.

33. Jackson v. Indiana, 406 U.S. 715, 738 (1972) (holding that different commitment standards for criminal and civil proceedings violate equal protection); *see also Foucha*, 504 U.S. at 88 (O'Connor, J., concurring) (asserting that commitment is only permissible where there is "some medical justification for doing so").

34. Jacobson v. Massachusetts, 197 U.S. 11, 26 (1905) (upholding a compulsory vaccination law).

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

36. *Cf.* Santosky v. Kramer, 455 U.S. 745, 766 (1982) (discussing the state's *parens patriae* interest in promoting the welfare of a child in a parental neglect proceeding).

37. *Hendricks*, 521 U.S. at 357 (emphasis added).

38. Jones v. United States, 463 U.S. 354, 368 (1983) (upholding the District of Columbia insanity acquittee commitment scheme).

Maintaining confinement "rests on continuing illness and dangerousness."[39] Furthermore, "[t]here simply is no necessary correlation between severity of the offense and length of time necessary for recovery. The length of the acquittee's hypothetical criminal sentence therefore is irrelevant to the purposes of his commitment."[40] Under its *parens patriae* powers, the state has a legitimate interest in "providing care to its citizens who are unable because of emotional disorders to care for themselves."[41] Historically, these two justifications were primarily used to commit the criminally insane[42] and those severely unable to function.[43]

### B. *The Legacy of the First "Sex Psychopath" Civil Commitment Laws*

Sex offender commitment statutes also have a legacy in this country. In the 1930s, states enacted the first statutes to divert "sex psychopaths" from the criminal justice system to the mental health system.[44] This change represented an attempt to address the dichotomy posed by sex offenders: "In many respects, their crimes are felonious, antisocial acts and clearly fall within the purview of the criminal justice system. However, their compulsive, repetitive, driven behavior, which at times has no rational, logical reward, appears to fit the criteria of an emotional or psychiatric illness."[45] Psychiatrists were increasingly confident of their ability to predict which sex offenders posed a serious threat. "Intimately fused with the clinicians' belief in this ability was the idea that treatments were available to cure and rehabilitate the individuals

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39. *Id.* at 369.

40. *Id.* The community protection principle has even been used in the nonviolent offense context to civilly commit persons found not guilty by reason of insanity (NGRI). For example, Connecticut civilly committed a NGRI compulsive gambler who embezzled funds from his employer. The state supreme court noted that "[t]he predatory tendencies of a potential embezzler seriously endanger the public at large," and that "[d]ue to mental illness, his release would constitute a danger to himself or others in a property sense." State v. Lafferty, 472 A.2d 1275, 1278 & n.3 (Conn. 1984).

41. Addington v. Texas, 441 U.S. 418, 426 (1979) (holding that to commit an individual to a mental institution in a civil proceeding, the state is required by the Due Process Clause to prove by clear and convincing evidence the two statutory conditions to commitment: that the person sought to be committed is mentally ill, and that he requires hospitalization for his own welfare and protection of others).

42. *See, e.g.*, *Jones*, 463 U.S. at 354 (so insane that the committed individual is excused from criminal responsibility altogether).

43. *See, e.g.*, *Addington*, 441 U.S. at 418, 426 (emotional disorder, manifested as psychotic schizophrenia).

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

45. Gene G. Abel & Joanne-L. Rouleau, *Male Sex Offenders*, *in* HANDBOOK OF OUTPATIENT TREATMENT OF ADULTS: NONPSYCHOTIC MENTAL DISORDERS 271, 271 (Michael E. Thase, Barry A. Edelstein & Michael Hersen eds., 1990).

identified."[46] In 1940, the Supreme Court upheld the civil commitment of a sex offender who suffered from "an utter lack of power to control [his] sexual impulses."[47] By 1960, twenty-six states had adopted some form of a sexually dangerous person statute.[48]

However, during the 1970s and 1980s, these statutes fell from grace, for "[t]he optimism of earlier decades that psychiatry held the cure to sexual psychopathy no longer shone so brightly."[49] Moreover, states became increasingly aware that not all violent sex offenders were responding to treatment, that sex offenders were in many cases not mentally ill, that treatment had failed to reduce recidivism, and that commitment raised civil rights concerns.[50] Psychiatrists had also become increasingly convinced that sex offenders with antisocial personality disorder (ASP), who form a very large part of the sex offender population, were untreatable[51] and disruptive within the hospital environment. "Antisocial personality disorder patients with severe psychopathy are likely to behave cruelly toward others and show no need to justify or rationalize their behaviors. Such individuals should not be considered for a treatment setting because they place both staff and genuinely mentally ill patients at risk."[52] By 1990, only twelve states had such laws.[53]

### C. *The New, Less-Civil Generation of Sex Offender Civil Commitment Laws*

During the 1990s, however, public concern about the danger posed by sex offenders grew as a result of heinous crimes, often involving the sexual abuse and murder of victims.[54] Atrocities like the rape and strangulation of Stephanie

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46. Blacher, *supra* note 44, at 898.

47. Minnesota *ex rel.* Pearson v. Probate Court, 309 U.S. 270, 274 (1940).

48. Blacher, *supra* note 44, at 903.

49. AM. PSYCHIATRIC ASS'N, DANGEROUS SEX OFFENDERS: A TASK FORCE REPORT OF THE AMERICAN PSYCHIATRIC ASSOCIATION 11 (1999).

50. Blacher, *supra* note 44, at 906.

51. ASP sufferers are "well satisfied with themselves and with their inner landscape, bleak as it may seem to outside observers. . . . Given these attitudes, it is not surprising that the purpose of [psychotherapy] is lost on psychopaths." ROBERT D. HARE, WITHOUT CONSCIENCE: THE DISTURBING WORLD OF THE PSYCHOPATHS AMONG US 195 (Guilford Press 1999) (1995).

52. J. Reid Meloy, *Antisocial Personality Disorder*, *in* 2 TREATMENTS OF PSYCHIATRIC DISORDERS 2251, 2258 (Glen O. Gabbard ed., 3d ed. 2001); *see also* DONALD W. BLACK, BAD BOYS, BAD MEN 130 (1999) ("Many experienced psychiatrists, myself included, are astonished that inpatient care is ever recommended for antisocials. Antisocials are a nuisance on inpatient units, becoming belligerent when their demands go unmet and using manipulation to gain their way, particularly as their days in the hospital drag on. They test the limits of both physicians and staff . . . ." (endnote omitted)).

53. AM. PSYCHIATRIC ASS'N, *supra* note 49, at 11.

54. Ass'n for the Treatment of Sexual Abusers Executive Bd. of Dirs., *Reducing Sexual Abuse Through Treatment and Intervention with Abusers* (adopted November 6, 1996), *available at* http://www.atsa.com/pptreatment.html [hereinafter ATSA Treatment].

Schmidt, a Kansas college student, by a recently paroled rapist renewed interest in sexual offender commitment laws, leading, for instance, to the enactment of the Kansas Sexually Violent Predator Act in 1994.[55] Unlike earlier laws, this new breed of sex offender commitment statute did not provide for institutionalization in lieu of prison, but rather in addition to it.[56] "Thus, their primary purpose would appear to be incapacitative rather than therapeutic. No one has suggested that these laws reflect a renewed faith in the power of psychiatry to cure sex offenders."[57] Indeed, the Kansas legislature found that "sexually violent predators generally have antisocial personality features which are unamenable to existing mental illness treatment modalities," and it therefore created the Act in order to institutionalize sex offenders for the "very long term."[58]

Nonetheless, the new laws are, at least on paper, dedicated to the dual purposes of community protection and offender treatment.[59] In the case of Kansas, the state legislature found that its existing laws were "inadequate" to address the special risks and needs of sex offenders.[60] To rectify that problem in the new Act, the legislature defined the confinement-eligible class of sex

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The Association warns, "[c]ertainly these [murderous] offenders have committed very heinous acts and merit society's attention and censure; however, it is important to realize that this type of offender does not represent the typical sex offender." *Id.*

55. Carla J. Stovall, Kansas v. Hendricks *Package: The Privilege of Arguing Before the United States Supreme Court*, 46 KAN. L. REV. 1, 1-2 (1997).

56. AM. PSYCHIATRIC ASS'N, *supra* note 49, at 12.

57. *Id.* Although few psychiatrists maintain that there is a "cure" for sex offenders' "mental abnormalities," there are those who hold out hope that more successful treatment methods may be found. "Treatment for sex offending is still a developing field. Because sex offenses were kept hidden for many years, the topic did not receive priority attention for funding." ATSA Treatment, *supra* note 54.

58. KAN. STAT. ANN. § 59-29a01 (1994). These legislative findings were subsequently amended. *See* KAN. STAT. ANN. § 59-29a01 (2003) (focusing on the special needs of sexually violent predators rather than on either the inability to treat such predators or their dangerousness to society). The 1994 findings suggest the legislature's intent when enacting the Act.

59. *See, e.g.*, KAN. STAT. ANN. § 59-29a01 (2003) (establishing an "involuntary civil commitment process for the potentially long-term control, care and treatment of sexually violent predators").

60. *Id.* The legislature asserted that the state's general civil commitment procedure was "intended to provide short-term treatment to individuals with serious mental disorders and then return them to the community." KAN. STAT. ANN. § 59-29a01 (1994). This approach did not mesh with the legislature's finding that sex offenders are untreatable and that "their likelihood of engaging in repeat acts of predatory sexual violence is high." *Id.* Moreover, many general commitment statutes do not apply to sex offenders, since those laws tend to focus on those unable to form criminal intent at all, those incompetent to stand trial, and those unable to care for themselves. Brief of Amici Curiae Nat'l Ass'n of Criminal Def. Lawyers, Nat'l Legal Aid & Defender Ass'n, Am. Civil Liberties Union & Comm. for Pub. Counsel Servs. at 10, Kansas v. Crane, 534 U.S. 407 (2002) (No. 00-957) [hereinafter NACDL Brief].

offenders very broadly. The Act defines a "sexually violent predator" as "any person who has been convicted of or charged with a sexually violent offense and who suffers from a mental abnormality or personality disorder[61] which makes the person likely to engage in repeat acts of sexual violence."[62] The Act further defines "mental abnormality" as "a congenital or acquired condition affecting the emotional or volitional capacity which predisposes the person to commit sexually violent offenses in a degree constituting such person a menace to the health and safety of others."[63] Thus, not only a past offense, but also an additional element—a mental abnormality or a personality disorder—is required to commit a sex offender.[64]

However, limiting commitment only to those with either a mental abnormality or a personality disorder does not result in a very exclusive group of potential committees.[65] The Supreme Court permits only "a limited subclass of dangerous persons" to be committed.[66] By creating the new term "mental abnormality," rather than using medically and legally recognized terms like "mental illness" or "mental disorder," Kansas enjoys a freer hand in determining who may be committed as an SVP.[67] "'Mental abnormality' connotes sufficient vagueness that nearly any symptom, deficit, or historical detail might be included. 'Mental abnormality' is much broader than any conceivable contemporary psychiatric diagnosis of mental disorder or mental illness."[68] By including the term "personality disorder," the door to commitment is opened even wider.[69]

Although these terms extend the reach of civil commitment well beyond its traditional bounds, the Supreme Court has given legislative determinations great leeway, particularly where psychiatrists have not reached consensus about how dangerous or treatable a class of potential committees is, as in the case of

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61. The Act does not define "personality disorder." However, at Crane's commitment trial, the judge defined it as a "condition recognized by the . . . [DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (4th ed. 1994) [hereinafter DSM-IV]], and includes antisocial personality disorder." *In re* Crane, 7 P.3d 285, 288 (Kan. 2000). Some states, such as Arizona, specifically exclude antisocial personality disorder as a basis for commitment. *See* ARIZ. REV. STAT. ANN. § 36-501(22)(c) (West 2003).

62. KAN. STAT. ANN. § 59-29a02(a) (2003).

63. *Id.* § 59-29a02(b).

64. This (at least superficially) conforms with the Supreme Court's holding that dangerousness alone is ordinarily an insufficient justification for civil commitment. Kansas v. Hendricks, 521 U.S. 346, 358 (1997).

65. The term "committee" is used in this Note to refer to persons who are civilly committed.

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

67. *See* SLOVENKO, *supra* note 27, at 61-62.

68. Robert M. Wettstein, *A Psychiatric Perspective on Washington's Sexually Violent Predators Statute*, 15 U. PUGET SOUND L. REV. 597, 602 (1992). Kansas's Act was modeled on the Washington state sex offender commitment law. Stovall, *supra* note 55, at 2.

69. *See* SLOVENKO, *supra* note 27, at 62.

sex offenders.[70] However, critics have lamented the circularity of the term "mental abnormality," because "the abnormality is derived from the sexual behavior which in turn is used to establish the predisposition to other sexual behavior."[71] Thus, they complain that the Act permits institutionalization based exclusively on past conduct, divorcing civil commitment from reliance on a medically diagnosable mental illness that can be treated.[72]

Despite criticism that the pool of potential committees is not sufficiently narrow, the actual commitment procedures Kansas established meet constitutional minima. The state may seek to civilly commit convicted sex offenders; commitment proceedings may begin before they are released from prison.[73] Persons charged with sex offenses, but who were not convicted, are also eligible for commitment if they were found not guilty by reason of insanity or if they were found incompetent to stand trial.[74] If the state persuades a trial judge that there is probable cause for a finding that the offender meets the definition of an SVP, then the offender is held in custody.[75] The offender is entitled to a hearing within three days to contest the probable cause finding; he[76] is guaranteed the right to counsel, to present evidence, to cross-examine witnesses, and to copy all petitions and reports in the court file.[77] If probable cause is upheld, the state solicits a psychiatric evaluation.[78] Within sixty days, the case must go to trial, and the state must prove beyond a reasonable doubt to a unanimous jury that the defendant is an SVP.[79] If the jurors so find, the SVP

70. Jones v. United States, 463 U.S. 354, 365 n.13 (1983) ("The lesson we have drawn is not that government may not act in the face of this [scientific] uncertainty, but rather that courts should pay particular deference to reasonable legislative judgments.").

71. Wettstein, *supra* note 68, at 602.

72. John Q. La Fond, *Washington's Sexually Violent Predator Law: A Deliberate Misuse of the Therapeutic State for Social Control*, 15 U. PUGET SOUND L. REV. 655, 698-99 (1992). "[L]egislators have used psychiatric commitment to effect nonmedical societal ends that cannot be openly avowed. In the opinion of the Task Force, this represents an unacceptable misuse of psychiatry." AM. PSYCHIATRIC ASS'N, *supra* note 49, at 174.

73. KAN. STAT. ANN. § 59-29a04(a) (2003).

74. *Id.* § 59-29a03(a). A person is also eligible for commitment if the jury answers affirmatively a special jury question finding the defendant not guilty solely because he could not form the requisite criminal intent on account of a mental disease or defect. *See id.* § 22-3221.

75. *Id.* § 59-29a05(a).

76. Throughout this Note, I use the masculine when referring to SVPs and persons with antisocial personality disorder. This is because the vast majority of SVPs committed by states, as well as the vast majority of those with ASP, are men. *See* BLACK, *supra* note 52, at xiii (observing that ASP is up to eight times more common in men than women).

77. KAN STAT. ANN. § 59-29a05(c) (2003).

78. *Id.* § 59-29a05(d).

79. *Id.* §§ 59-29a06 to -29a07(a). If indigent, the offender is entitled to appointed counsel at trial. *Id.* § 59-29a06.

is committed to the custody and care of the Secretary of the Department of Social and Rehabilitation Services (the "Secretary").[80]

Once an SVP is committed, there are three avenues for his release, all of which require the consent of the court.[81] First, the Secretary may at any time find that the offender's mental condition has changed and recommend that he be released. If a judge agrees, the offender is transitionally freed.[82] Second, each SVP must be examined annually, and if the judge finds probable cause that the offender may be safely released, the state must prove once more beyond a reasonable doubt that the offender remains an SVP, or else the offender is transitionally released.[83] Finally, the SVP may petition at any time for release. If the petition is not approved by the Secretary, the judge may deny it without a hearing.[84]

### D. Hendricks*: The Supreme Court Upholds Sex Offender Commitment*

The Act's constitutionality was upheld in 1997 in *Hendricks*. Leroy Hendricks had a forty-year string of convictions and prison sentences for molesting at least twelve children, including his own stepdaughter and stepson.[85] He conceded that he "can't control the urge" to molest children when he "get[s] stressed out."[86] Just prior to his release to a halfway house after serving ten years for molesting two adolescent boys, Kansas moved to civilly commit him.[87] The trial court held that pedophilia qualifies as a mental abnormality, and a jury voted to commit him.[88]

The United States Supreme Court found that "[p]revious instances of violent conduct are an important indicator of future violent tendencies,"[89] and "'from a legal point of view there is nothing inherently unattainable about a prediction of future criminal conduct.'"[90] Nonetheless, the Court sought to

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80. *Id.* § 59-29a07(a).

81. This differs from many traditional civil commitment statutes, under which committees could be released pursuant to a doctor's medical judgment.

82. KAN STAT. ANN. § 59-29a10(a)-(b).

83. *Id.* § 59-29a08(a)-(b). If indigent, the offender is entitled to a court-appointed professional to perform the annual evaluation. *Id.* § 59-29a08(a).

84. *Id.* § 59-29a11.

85. Kansas v. Hendricks, 521 U.S. 346, 354-55 (1997).

86. *Id.* at 355.

87. *Id.* at 353-54.

88. *Id.* at 355-56.

89. *Id.* at 358 (citing Heller v. Doe, 509 U.S. 312, 323 (1993) (finding this in the case of the mentally retarded, as distinguished from the mentally ill)).

90. *Id.* (quoting Schall v. Martin, 467 U.S. 253, 278 (1984) (upholding a statute authorizing the pretrial detention of an accused juvenile delinquent by citing to cases in which a prediction of future criminal conduct justified the imposition of a death sentence, the granting of parole, and the revocation of parole)).

limit the application of the Act to only a subset of the many criminals dangerous to society who suffer from mental disorders. Therefore, the Court focused on Hendricks's admitted lack of volitional control in upholding his commitment as civil detention, not criminal punishment.

> The Kansas Act is plainly of a kind with these other civil commitment statutes: It requires a finding of future dangerousness, and then links 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. . . . This admitted lack of volitional control, coupled with a prediction of future dangerousness, adequately distinguishes Hendricks from other dangerous persons who are perhaps more properly dealt with exclusively through criminal proceedings.[91]

Even after finding that Hendricks's detention was not criminal punishment, the Court continued its analysis further to determine whether the Act itself pursued criminal justice aims. On its face, the statute claims to be civil.[92] Nonetheless, "[w]here a defendant has provided 'the clearest proof' that 'the statutory scheme [is] so punitive either in purpose or effect as to negate [the State's] intention' that the proceeding be civil, it must be considered criminal."[93]

The Court found that the Act does not satisfy the two primary purposes of criminal punishment, retribution and deterrence.[94] Although an individual must have been prosecuted for a sex crime in order to be eligible for commitment, he need not have been convicted, but could instead have been found not guilty by reason of insanity.[95] Because the predicate act for commitment did not necessarily require scienter and was used only for evidentiary purposes to demonstrate either a mental abnormality or future dangerousness, the Court found the Act was not criminal.[96]

Moreover, the Court held that the Act does not fulfill criminal law's deterrent purpose because those committed under it suffer from mental

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91. *Id.* at 358, 360. At the *Crane* oral argument, a Justice provided an explanation for why the Court had stressed Hendricks's lack of volitional control in finding his commitment constitutional. "[B]ecause many criminals are—have personality disorders and are dangerous to society, we want to narrow [the class of committable offenders] somewhat. So, we—so the Court added this volitional control aspect." United States Supreme Court Official Transcript at 8, Kansas v. Crane, 534 U.S. 407 (2002) (No. 00-957) [hereinafter *Crane* Supreme Court Transcript]. N.B.: The transcript does not indicate which Justice is speaking.

92. *Hendricks*, 521 U.S. at 361. "The question whether a particular proceeding is criminal . . . is first of all a question of statutory construction." Allen v. Illinois, 478 U.S. 364, 368 (1986) (holding that the privilege against self-incrimination does not apply to a civil commitment proceeding).

93. *Allen*, 478 U.S. at 369.

94. *Hendricks*, 521 U.S. at 361-62.

95. *See* KAN. STAT. ANN. § 59-29a03(a) (2003).

96. *Hendricks*, 521 U.S. at 362.

abnormalities or personality disorders that inhibit self-control, and therefore they cannot be deterred.[97] Thus, the prohibitions against double jeopardy and ex post facto punishment do not come into play.[98] However, Justice Breyer, joined by three other members of the Court, dissented vigorously that the statute was punitive because Kansas did not even offer treatment to Hendricks during his civil commitment and therefore the statute's civil status was merely superficial.[99]

Responsible for the majority's decisive fifth vote, Justice Kennedy paved the way for *Crane* by carefully limiting his support for the Act to the facts before the Court in *Hendricks*.

> On the record before us, the Kansas civil statute conforms to our precedents. If, however, civil confinement were to become a mechanism for retribution or general deterrence, or 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.[100]

Despite such reservations, prosecutors assumed that the Act had passed constitutional muster, and in the intervening years the number of sex offenders committed in Kansas ballooned from twelve in August 1998 to sixty-five in June 2001.[101] As of January 2002, in the history of the Act, only three SVPs had been conditionally released.[102] Nationally, between summer 1998 and June 2001, the number of SVPs held in states with laws similar to the Act rose from 523 to around 1200.[103]

## II. *HENDRICKS* REDUX: MAY KANSAS COMMIT A MAN WITH SELF-CONTROL?

Michael Crane is hardly the ideal poster child for upholding substantive due process rights. An exhibitionist and would-be rapist, he was the unlikely beneficiary of appellate rulings that overturned most of his sentence. Understandably, Crane's victims and his prosecutor were disappointed that he would serve only a fraction of his original sentence. So, after being chastened

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97. *Id.* at 362.

98. *Id.* at 369-71.

99. *Id.* at 396 (Breyer, J., dissenting).

100. *Id.* at 373 (Kennedy, J., concurring).

101. Brief of Amici Curiae State of Illinois et al. at 9 n.5, Kansas v. Crane, 534 U.S. 407 (2002) (No. 00-957) [hereinafter State Attorneys General Brief]; Tony Rizzo, *Jurors Hear Arguments in Sex-Predator Trial; Michael T. Crane Should Be Confined, Prosecutors Assert*, KAN. CITY STAR (Metropolitan ed.), Aug. 11, 1998, at B2.

102. Tony Rizzo, *Man Freed from Kansas' Sexual Predator Program; Therapy Required in Michael T. Crane's Conditional Release*, KAN. CITY STAR (Metropolitan ed.), Jan. 26, 2002, at B1.

103. State Attorneys General Brief, *supra* note 101, at 9 n.5; ROXANNE LIEB & SCOTT MATSON, SEXUAL PREDATOR COMMITMENT LAWS IN THE UNITED STATES: 1998 UPDATE 10 tbl.1 (1998), *available at* http://www.wa.gov/wsipp/crime/pdf/sexcomm_98.pdf.

by the state supreme court, the prosecutor tried another tactic: civil commitment.

But Crane was destined to have yet another day before Kansas's highest court, for he was a very different man from Leroy Hendricks, the child molester with no self-control whose commitment the United States Supreme Court had upheld. There was less evidence of sex crime recidivism in Crane's case.[104] The state's witnesses agreed that Crane had significant control over his actions.[105] Moreover, no known treatment exists for the basis for his commitment, antisocial personality disorder.[106] And attempts to treat those suffering from ASP disrupt the treatment of "genuinely mentally ill" patients while having little if any effect on the ASP patient.[107] Finally, the state's own psychiatric witness estimated that more than seventy-five percent of all prisoners suffer from ASP, hardly making the potential class of committees a narrow group.[108] Against this backdrop, and in spite of *Hendricks*, the Kansas Supreme Court revisited the question of the Act's constitutionality.

### A. *The Kansas Supreme Court Again Denies the Constitutionality of Sex Offender Civil Commitment*

When in 1997 the United States Supreme Court reversed the judgment of the Kansas high court and upheld the constitutionality of Leroy Hendricks's civil commitment, the Justices dealt with the very first instance employing the Kansas Act. Years—and numerous civil commitments—later, the facts of *Hendricks* proved not to be representative of the commitment proceedings in cases like Michael Crane's.

Seizing on language in *Hendricks* upholding the Act based largely on the committee's lack of volitional control,[109] the Kansas Supreme Court reversed Crane's commitment and remanded for a new trial at which the jury was to

104. Although Crane had been arrested for indecent exposure (several times), sexual assault, felony attempted forcible rape, felony sexual abuse, and abuse of a child, he had been convicted only of the 1993 incidents and of sexual abuse in the first degree, 12 years earlier. As the state's psychiatrist reported, "Mr. Crane's aggression toward women appears not always to have been adjudicated as fact." Several of the sex crime arrests had led to unsuccessful prosecutions. On the other hand, Crane had also been convicted of trespass, burglary, resisting police, and felony theft. Brief of Petitioner State of Kansas at 3, *Crane* (No. 00-957); Brief of Amici Curiae the Am. Psychiatric Ass'n the Am. Academy of Psychiatry & the Law at 4 n.2, *Crane* (No. 00-957) (citing Joint Appendix at 12-16) [hereinafter APA Brief].

105. *In re* Crane, 7 P.3d 285, 288 (Kan. 2000).

106. Meloy, *supra* note 52, at 2253.

107. *Id.* at 2258.

108. *In re Crane*, 7 P.3d at 290.

109. *See supra* text accompanying note 91.

determine whether he could control his behavior.[110] The state high court reasoned that, because Crane was committed on the basis of a "personality disorder," which was not defined in the Act to include a lack of volitional control, the jury had not made the required finding in the initial trial.[111] Moreover, the state's psychiatric expert witness testified at Crane's trial that, although ASP can affect one's self-control, it does not generally and did not in Crane's case affect "volitional control to the degree that he cannot control his behavior."[112] The court also suggested that the definition of the term "mental abnormality" was unconstitutionally broad, since it includes behavior that a potential committee can control.[113]

### B. *In* Crane, *the United States Supreme Court Requires a Finding of a Lack of Volitional Control*

The United States Supreme Court, while agreeing with some of the Kansas court's reasoning, vacated the state decision because the Justices rejected as unworkable the premise that only those with a *complete* lack of volitional control—who experience "irresistible impulses"—may be civilly committed. The Court found that most severely ill people retain some degree of volitional control, and "[i]nsistence upon absolute lack of control would risk barring the civil commitment of highly dangerous persons suffering severe mental abnormalities."[114]

The Court, however, also rejected the Kansas Attorney General's position that no lack of control determination whatsoever is required. "[T]here must be

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110. *In re Crane*, 7 P.3d at 290.

111. *Id.* Exhibitionism alone would not make Crane dangerous and would not be a basis for civil commitment, according to the state's witnesses. APA Brief, *supra* note 104, at 4-5 (citing Joint Appendix at 94-95, 98, 117). The DSM-IV provides this explanation of exhibitionists' behavior:

> If a person acts on [the urges to expose himself], there is generally no attempt at further sexual activity with the stranger. In some cases, the individual is aware of a desire to surprise or shock the observer. In other cases, the individual has the sexually arousing fantasy that the observer will become sexually aroused.

DSM-IV, *supra* note 61, at 525.

112. APA Brief, *supra* note 104, at 5 n.5 (citing Joint Appendix at 70).

113. *See In re Crane*, 7 P.3d at 290.

114. Kansas v. Crane, 534 U.S. 407, 412 (2002). Compelling a polar distinction between either possessing volitional control or not yields an unrealistic result. "The line between an irresistible impulse and an impulse not resisted is probably no sharper than that between twilight and dusk." *Id.* (citing AM. PSYCHIATRIC ASS'N, STATEMENT ON THE INSANITY DEFENSE 11 (1982)). To address this concern, the Model Penal Code recommends subjective differentiation: "A person is not responsible for criminal conduct if at the time of such conduct as a result of 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." MODEL PENAL CODE § 4.01 (1962) (emphasis added).

proof of serious difficulty in controlling behavior."[115] The majority stressed that such findings keep the Act constitutional by distinguishing between those eligible for civil commitment and those who must be dealt with exclusively through ordinary criminal proceedings. "That distinction is necessary lest 'civil commitment' become a 'mechanism for retribution or general deterrence'—functions properly those of criminal law, not civil commitment."[116]

Despite the constitutional importance of only committing those with "serious difficulty" controlling themselves, the Supreme Court neither clarified where to draw that critical line nor specified whether existing state procedures comport with the lack of volitional control requirement. "[T]he Constitution's safeguards of human liberty in the area of mental illness and the law are not always best enforced through precise bright-line rules."[117] Instead, the Court decided to "proceed[] deliberately and contextually, elaborating generally stated constitutional standards."[118] The states retain "considerable leeway" in determining what ailments qualify an individual for commitment.[119]

*Crane* constituted a belated effort by the majority to cabin its earlier decision in *Hendricks* by limiting that case to its facts.[120] The reversal in tone between *Hendricks* and *Crane* suggests that until encountering the latter case, the Justices had not been confronted with the full implications of their validation of the Act.[121] A Justice remarked, "[O]n [the State's] theory any sociopath who has committed [a] sexual offense can be committed under this statute upon release."[122]

Justices were concerned that, even given the Court's normal deference to states' judgments in setting grounds for commitment, the Act's thresholds for what constitutes a committable mental abnormality or personality disorder were too low.[123] Sex offenders with antisocial personality disorder, whom the Act

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

116. *Id.* at 412 (citing Kansas v. Hendricks, 521 U.S. 346, 372-73 (Kennedy, J., concurring)).

117. *Id.* at 413.

118. *Id.* at 414.

119. *Id.* at 413.

120. *See, e.g.*, *id.* at 414 ("[W]e have sought to provide constitutional guidance in this area by proceeding deliberately and contextually, elaborating generally stated constitutional standards and objectives as specific circumstances require. *Hendricks* embodied that approach."); *id.* at 415 ("The Court in *Hendricks* had no occasion to consider whether confinement based solely on 'emotional' abnormality would be constitutional, and we likewise have no occasion to do so in the present case.").

121. A Supreme Court Justice said at oral argument, "I thought [the State] conceded that you have to show difficulty in controlling conduct, and if you don't, this is a quite different case from what I thought." *Crane* Supreme Court Transcript, *supra* note 91, at 24.

122. *Id.* at 25-26.

123. In fact, the American Psychiatric Association suggests that Kansas may have relied on a faulty premise in setting the prerequisites for commitment under the Act. The Association argues that

spelled out in its legislative findings as a chief target group for commitment, are diagnosed based upon having at least three of seven symptoms.[124] One Justice opined, "You could be a liar[,] [y]ou could be a malingerer, and you could not pay your debts, and you'd make those three."[125] Crane had been diagnosed with ASP on account of his "failure to conform to social norms with respect to lawful behaviors as indicated by repeatedly performing acts that are grounds for arrest; impulsivity or failure to plan ahead; [and] irritability and aggressiveness, as indicated by repeated physical fights or assaults."[126]

A personality disorder diagnosis based on such factors sounds as though it is custom-designed based on criminals' typical personality traits. Indeed, ASP originated with the notion of a "*criminal personality*."[127] Crane's attorney characterized ASP-based civil commitment as a vicious circle, whereby a criminal's history of offenses provides the basis for an ASP diagnosis, which leads to a prediction of future dangerousness, which in turn justifies the criminal's civil commitment.[128]

The same sequence of findings could presumably lead to the commitment of many offenders. Research shows that up to eighty percent of criminals suffer from ASP,[129] suggesting that the disorder is an impermissibly broad

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> a significant number of sex offenders may have substance abuse or personality disorder diagnoses, but these conditions usually have little explanatory connection to the offender's sexual behavior. Unfortunately, however, concerned legislatures have sought to use the existence of a personality disorder per se as a basis for civil commitment of a sex offender. Thus the statutory category of "mental disorders" has been defined in a manner that bears no relationship to the usual moral and clinical criteria for criminal responsibility or to the usual predicates for compulsory psychiatric hospitalization or treatment.

AM. PSYCHIATRIC ASS'N, *supra* note 49, at 9. If it is true that there is usually little correlation between a sex offender's personality disorder and his sexual behavior, then commitment is predicated on dangerousness alone, which is not constitutionally permitted. *See* Kansas v. Hendricks, 521 U.S. 346, 358 (1997).

124. The symptoms are: "(1) failure to conform to social norms with respect to lawful behaviors as indicated by repeatedly performing acts that are grounds for arrest"; "(2) deceitfulness, as indicated by repeated lying, use of aliases, or conning others for personal profit or pleasure"; "(3) impulsivity or failure to plan ahead"; "(4) irritability and aggressiveness, as indicated by repeated physical fights or assaults"; "(5) reckless disregard for safety of self or others"; "(6) consistent irresponsibility, as indicated by repeated failure to sustain consistent work behavior or honor financial obligations"; and "(7) lack of remorse, as indicated by being indifferent to or rationalizing having hurt, mistreated, or stolen from another." DSM-IV, *supra* note 61, at 649-50.

125. *Crane* Supreme Court Transcript, *supra* note 91, at 26.

126. *In re* Crane, 7 P.3d 285, 290 (Kan. 2001).

127. Philip H. Bornstein, Carolyn Ford, Joseph E. Biron, Bonnie M. Brekke & David B. Stube, *Antisocial Personality Disorder*, *in* HANDBOOK OF OUTPATIENT TREATMENT OF ADULTS: NONPSYCHOTIC MENTAL DISORDERS 333, 334 (Michael E. Thase ed., 1990).

128. *Crane* Supreme Court Transcript, *supra* note 91, at 51 (quoting John C. Donham, Esq.).

129. *See In re Crane*, 7 P.3d at 290 (citing state's psychiatrist expert witness testimony at Crane's commitment trial that "probably more than 75% of prison inmates suffer from antisocial personality disorder"); *see also* Stephen D. Hart, Robert D. Hare & Timothy J.

basis for civil commitment.[130] Such overbreadth is particularly troubling in light of the fact that numerous prisoners suffer from other mental abnormalities (as broadly defined by the Act) or personality disorders that also make persons eligible for commitment.

Moreover, ASP's prevalence among prisoners calls into question whether the Act's standards adequately distinguish those criminals "subject to civil commitment 'from other dangerous persons who are perhaps more properly dealt with exclusively through criminal proceedings.'"[131] The Act can be construed to permit the commitment of the vast majority of criminals who, predictably, have a "criminal personality," i.e., ASP. This result is hardly surprising, given that a central part of the diagnosis is failure to conform to dominant "social norms with respect to lawful behaviors."[132]

Justice Scalia, joined by Justice Thomas, dissented in *Crane*, arguing that *Hendricks* had already established that the Act is constitutional as written. The dissent asserted that, by definition, offenders with a mental abnormality or personality disorder are prevented from exercising "adequate control" over their behavior and are therefore unlikely to be deterred by the threat of penal sanction.[133] Thus, no additional finding of a lack of volitional control is required.

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Halpur, *The Psychopathy Checklist—Revised (PCL-R): An Overview for Researchers and Clinicians*, *in* 8 ADVANCES IN PSYCHOLOGICAL ASSESSMENT 103, 105 (J. Rosen & P. McReynolds eds., 1991) (finding that 75-80% of criminals are diagnosable with ASP); P. Moran, *The Epidemiology of Antisocial Personality Disorder*, 34 SOC. PSYCHIATRY & PSYCHIATRIC EPIDEMIOLOGY 231, 234 (1999) (finding that 40-60% of male prisoners are diagnosable with ASP); Joseph J. Romero & Linda Meyer Williams, *Recidivism Among Convicted Sex Offenders: A 10 Year Followup Study*, FED. PROBATION, Mar. 1985, at 58, 59 (1985) (finding that 69% of all sexual offenders have a personality disorder); James S. Wulach, *Diagnosing the DSM-III Antisocial Personality Disorder*, 14 PROF. PSYCHOLOGY: RES. & PRAC. 330, 331 (1983) (finding 75-80% of criminals diagnosable with ASP). The diagnosis of ASP has been criticized for having become too broad and undifferentiated. In 1980, when the third edition of the *Diagnostic and Statistical Manual of Mental Disorders* was published, the number of persons who met the criteria for antisocial personality disorder increased 250% relative to the number that met the second edition's diagnosis. Bornstein, *supra* note 127, at 341. "[D]iagnosis based on the sole use of explicit criteria leaves little room for gradations of the disorder." *Id.*

130. *See* Zadvydas v. Davis, 533 U.S. 678, 690 (2001) (emphasizing that due process requires that civil commitment statutes be "'narrow'" in scope (quoting Foucha v. Louisiana, 504 U.S. 71, 80 (1992)).

131. Kansas v. Crane, 534 U.S. 407, 412 (2002) (quoting Kansas v. Hendricks, 521 U.S. 346, 360 (1997)).

132. DSM-IV, *supra* note 61, at 649. Persons diagnosed with ASP generally come from families with traits such as a family history of unemployment, poverty, excessive parental alcohol consumption, a parental psychiatric disorder, an absence of discipline, a lack of adult supervision, and family abandonment by the father. Bornstein, *supra* note 127, at 340.

133. *Crane*, 534 U.S. at 420-21 (Scalia, J., dissenting).

Moreover, Justice Scalia complained that the majority's opinion required a finding of a lack of *volitional* control in every case, even though the Act also provides for committing those who lack *emotional* control. This might prevent the commitment of "[t]he man who has a will of steel, but who delusionally believes that every woman he meets is inviting crude sexual advances[.] [He] is surely a dangerous sexual predator."[134]

The dissent further warned that the majority had given trial courts "not a clue" how to charge a jury in a commitment proceeding, and that this failure would cause confusion nationwide in states with sex offender commitment laws.[135] Justice Scalia would therefore have reversed rather than vacated the Kansas high court's judgment. This approach would have reaffirmed the existing state procedures that do not explicitly require a finding that an offender is unable to exercise adequate control.

## III. STATES USE *CRANE*'S AMBIGUITY TO OVERTURN THE COURT'S DECISION

Justice Scalia's criticism that the majority opinion was too opaque to be effectively implemented by states has been borne out in the several appellate cases that have considered *Crane*. On the other hand, another prediction in the dissent has not come to pass: Most state courts have not read *Crane* to require any additional jury finding that the sex offender lacks a degree of volitional control.[136] Instead, they have taken advantage of the majority opinion's ambiguity to change only minimally—or not at all—their commitment procedures.

State courts have conveniently ignored the fact that the Supreme Court did not reverse, but instead only vacated the Kansas ruling. This procedural move means that *Crane* was not a blind reaffirmation of *Hendricks*; rather, it was a clarification requiring states to add additional protections, beyond those already potentially implicit in the definition of mental abnormality in their statutes, to protect against the commitment of offenders who can exercise adequate volitional control. Nonetheless, even Kansas's Attorney General, who argued *Crane* before the Court, downplayed the ruling's effects: "We'll have to show that a potential predator has a serious difficulty in controlling his or her behavior, . . . [but] [f]rom a practical standpoint, I don't think prosecutors are really going to change the evidence they put on."[137]

The trend so far by state appellate courts has been to behave as if *Crane* had never been decided. Most state courts have maintained that their civil

134. *Id.* at 422 (Scalia, J., dissenting).

135. *Id.* at 423 (Scalia, J., dissenting) (emphasis omitted).

136. *See id.* at 424 (Scalia, J., dissenting) ("There is an obvious lesson [in *Crane*] for state supreme courts that do not agree with our jurisprudence: ignoring it is worth a try.").

137. Jim McLean, *Stovall Buoyed by Ruling on Extended Incarceration*, TOPEKA CAPITAL J., Jan. 23, 2002.

commitment laws already commit only those who lack significant volitional control, because there is a nexus between the targeted disorder and the committee's acts that "implicitly includes proof that the person's mental disorder includes serious difficulty in controlling his or her behavior, and this requisite proof distinguishes a dangerous sexual offender who has serious difficulty controlling his or her behavior from a dangerous but typical recidivist."[138] They concede that

> *Crane* clearly requires some determination of some lack of control before a respondent can be civilly committed. It is equally clear, however, that *Crane* does not require a specific jury determination that a respondent lacks volitional control as respondent suggests, because the Court in *Crane*, again, upheld the commitment in *Hendricks* as constitutional even though there was no specific jury determination of lack of control in *Hendricks*.[139]

This essentially represents the position that has been adopted in California, Illinois, Massachusetts, Minnesota, South Carolina, and Wisconsin.[140]

These state court decisions fly in the face of *Crane*, where the Supreme Court held that "there must be proof of serious difficulty controlling

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138. State v. Laxton, 2002 WI 82, ¶ 23, 647 N.W. 2d 784, 793 (rejecting a claim that *Crane* requires a jury to explicitly determine that a person committed under Wisconsin's sexually violent person commitment statute has serious difficultly in controlling his behavior).

139. People v. Hancock, 771 N.E.2d 459, 465 (Ill. App. Ct. 2002) (interpreting *Crane* as not requiring a specific determination of lack of volitional control because the nature and severity of the mental disorder distinguish individuals subject to commitment from the typical recidivist).

140. *See* People v. Ghilotti, 44 P.3d 949, 971 n.12 (Cal. 2002) (interpreting the link between mental disorder and dangerousness as satisfying *Crane* because the particular form of dangerousness, a mental disorder, not the particular degree of dangerousness, distinguishes individuals subject to commitment from the typical recidivist, and holding that even those sex offenders who are *not* more likely than not to recidivate may be committed); People v. Wollschlager, 122 Cal. Rptr. 2d 171, 175 (Cal. Ct. App. 2002) (observing, in upholding civil commitment under the California Sexually Violent Predator Act, that the California statute is "nearly identical to the Kansas Act"); People v. Williams, 120 Cal. Rptr. 2d 11, 15 (Cal. Ct. App. 2002) (holding that the California statutory language requiring a committee be "predispose[d] . . . to the commission of criminal sexual acts in a degree constituting the person a menace to the health and safety of others . . . clearly presumes a serious difficulty in controlling behavior," thereby satisfying the *Crane* requirements); *Hancock*, 771 N.E.2d at 465 ("*Crane* does not stand for the proposition that in every civil commitment case a jury must make a specific determination that the [committee] lacks volitional control."); *In re* Dutil, 768 N.E.2d 1055, 1064 (Mass. 2002) (interpreting sexually violent person commitment law as requiring a mental condition with a "general lack of power to control"); *In re* Ramey, 648 N.W.2d 260, 266-67 (Minn. Ct. App. 2002) (same); *In re* Luckabaugh, 568 S.E.2d 338, 348-49 (S.C. 2002) (upholding civil commitment based on existing language of the state sexually violent predator statute) ("We believe the Court's [*Crane*] ruling would have been more explicit if it intended [to require a special lack of control determination, mandating at least 16 states to hold new commitment hearings for over 1200 individuals committed under the states' sexually violent predator acts]."); *Laxton*, 2002 WI 82, ¶ 21, 647 N.W.2d at 793 (same).

behavior."[141] They fail to note how *Crane* distinguishes *Hendricks*, in which the SVP had himself conceded his utter inability to control his behavior.[142] Moreover, the states also ignore the *Crane* Court's emphasis that in *Hendricks* there was already unequivocal proof "of what the 'psychiatric profession itself classifie[d] . . . as a serious mental disorder'" and that "a critical distinguishing feature of that 'serious . . . disorder' there [i.e., *in Hendricks's particular case*] consisted of a special and serious lack of ability to control behavior."[143] Thus, proof of significantly impaired self-control was already established in *Hendricks*, unlike in *Crane*, where no such fact-finding occurred.

Mere incorporation by reference of a statutory definition that requires finding a lack of volitional control does not jell with either the holding or the underlying concerns of *Crane*. Thus, simple reaffirmation of preexisting law and procedure seems to fail the *Crane* requirement of adding some protection to ensure that each individual offender committed lacks volitional control. Instead, as the Wisconsin chief justice wrote in her dissent in *State v. Laxton*, the courts appear to be following Justice Scalia's dissent, not the majority holding, by finding an implicit lack of volitional control in the determination that an offender suffers from a mental abnormality.[144]

In contrast, a few state courts have remanded cases in order for a trial court to consider whether a civil committee lacks volitional control. Like the other states, they affirm the constitutionality of their states' sex offender commitment statutes, finding that the preexisting "definition of 'mental abnormality' specifically speaks of the 'degree' of the emotional or volitional condition suffered by the offender. The Supreme Court's requirement of 'serious difficulty' is a refinement of this term, not the addition of a new element."[145] Nonetheless, the Missouri Supreme Court reversed the commitment of a sex offender and remanded for a new trial using an amended jury instruction defining mental abnormality as "a congenital or acquired condition affecting the emotional or volitional capacity that predisposes the person to commit sexually violent offenses in a degree *that causes the individual serious difficulty in controlling his behavior*."[146] Similarly, the New Jersey Supreme Court remanded a commitment case for a trial court to determine whether the sex offender has "a substantial inability to control [his] conduct."[147]

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141. *Crane*, 543 U.S. at 413; *see also* text accompanying note 115.

142. *Id.* at 412-13.

143. *Id.* (omission in original).

144. *Laxton*, 2002 WI 82, ¶ 40, 647 N.W.2d at 797-98 (Abrahamson, C.J., dissenting) (arguing that the jury instructions were defective, since they did not direct the jury to determine that the sex offender lacked a degree of volitional control).

145. Thomas v. State, 74 S.W.3d 789, 792 n.1 (Mo. 2002).

146. *Id.* at 792.

147. *In re* W.Z., 801 A.2d 205, 216 (N.J. 2002).

The tone of the United States Supreme Court's comments during oral argument and the *Crane* decision itself show that the Justices intended to cage the endorsement they had given the Act in *Hendricks*. The facts behind Michael Crane's commitment made clear what Leroy Hendricks's more straightforward story did not: The Act—and its nearly identical counterparts in fifteen states—could be used to redefine how our society punishes typical criminals. Despite his horrific acts, Michael Crane is not unlike the vast majority of American prisoners—both sex offenders and other criminals alike—with whom he shares a "criminal personality." To permit his commitment based on such equivocal state expert testimony would facilitate supposedly nonpunitive institutionalization of any other class of criminals a state decides to target.

By limiting their *Hendricks* opinion to the facts in that case and reopening the door to further consideration of the Act's constitutionality, the Justices were reasserting control over a criminal-like procedure that was open to abuse. In doing so, the Court implicitly reaffirmed two basic principles underlying our criminal justice system: that ordinary offenders who have basic control over their actions will only be incapacitated once for their crimes, and that the means of that detention shall be prison, not ex post facto punishment via facilities like Larned State Security Hospital. Although state courts are currently not adhering to the spirit of *Crane*, the path to additional scrutiny of state procedure in this area has been laid.

## IV. THE DANGERS OF OVERLY BROAD CIVIL COMMITMENT STATUTES

It seems that such further scrutiny of states' civil commitment proceedings will indeed be necessary. Commitment statutes that are written and interpreted too broadly pose multiple problems because they blur the distinction between civil and criminal proceedings. Preventing certain criminal defendants from introducing evidence of diminished capacity at their criminal trials, while using that same evidence to later commit them, is a significant contradiction. Commitment also places a too-powerful tool in the hands of prosecutors, who may use it punitively to effectively lengthen criminals' detention; such legal moves imperil the principle that criminal sentences should be predictable and final. Finally, the justifications for sex offender commitment create a slippery slope that could be used further down the line to permit the commitment of other types of criminals, threatening to fundamentally change the American criminal justice system.

### A. *Mens Rea Contradictions Between Predicate Criminal and Later Civil Commitment Proceedings*

The low mental disability standard required for civil commitment is inconsistent with the trend toward minimizing criminal defendants' ability to present evidence of diminished capacity at trial. In Minnesota, "the defendant is barred from presenting evidence regarding his diminished capacity in the criminal system, but the state is allowed to present such evidence to justify a civil commitment after he has been convicted and served his sentence."[148] Incongruent mens rea standards between the civil and criminal proceedings expose the logical and legal flaws in the corners cut in order to apply civil commitment as broadly as constitutionally possible.

> This state has enacted carefully drafted enhanced sentencing mechanisms, which this court has upheld, for individuals convicted of a pattern of sexually-motivated crimes. If such persons are found to *intend* such acts, they should be convicted of serious crimes and sentenced accordingly. If, however, it is the position of the state that they cannot—rather than will not—control their sexual appetites, and the state can so demonstrate, civil commitment under the psychopathic personality statute is appropriate. To allow the state to first choose the criminal sanction, which requires a finding of a specific state of mind, and when that sanction is completed, to choose another sanction which requires a finding of the opposite state of mind, is a mockery of justice which places both the criminal and civil systems for dealing with sexual predators in disrepute.[149]

In criminal proceedings, prosecutors are understandably loath to admit a defendant's mental illness, because that may open the door for an insanity defense or compel them to level different charges. So long as the defendant is competent to assist in his defense—or can be made so, even by forcible medication—he is still generally considered competent to stand trial.[150] However, by using the much broader—and previously undefined—term of "mental abnormality," the state can have it both ways, using an inclusive definition of mental disability as a basis for involuntarily civilly committing an offender, but denying that offender an insanity or diminished capacity defense by using the much narrower term "mental illness" in criminal proceedings, which themselves serve as the predicates for postprison civil commitments. If states intend to continue using mental abnormalities like ASP as a basis for commitment, they should also permit them to be raised as defenses at trial. Either a criminal acted of his own free will and may be criminally convicted, or

148. *In re* Linehan, 518 N.W.2d 609, 615-16 (Minn. 1994) (Gardebring, J., dissenting).

149. *Id.* at 616 (Gardebring, J., dissenting).

150. *See* Aimee Feinberg, *Forcible Medication of Mentally Ill Criminal Defendants: The Case of Russell Eugene Weston, Jr.*, 54 STAN. L. REV. 769, 782 (2002) (citing United States v. Weston, 255 F.3d 873, 882 (D.C. Cir. 2001)).

he has a mental infirmity that caused, or at least contributed to, his crimes, and commitment and treatment are the appropriate response.

### B. *Civil Commitment Gives Prosecutors Too Much Power to Do an End-Run Around the Finality of Criminal Punishment*

Civil commitment also facilitates a blurring of the line between criminal punishment and civil remedies by, in effect, providing prosecutors a means to revisit trial outcomes they find unsatisfactory. The Supreme Court in *Crane* was unwilling to afford prosecutors too much discretion in determining who should be committed under the Act, and therefore it imposed the lack of volitional control requirement. At oral argument, a Justice observed that Kansas wanted the determination of which of the many eligible sex offenders warranted commitment proceedings to be left to prosecutors. "[B]ut I mean, that's not something that—that we would generally do. I mean, if we thought of all prosecutors as being wise and kind and good, then there would be a whole lot of rights that we wouldn't have to worry about."[151] Indeed, Justice Kennedy's warning in his *Hendricks* concurrence appears prescient given the facts of *Crane*: "If the civil system is used simply to impose punishment after the State makes an improvident plea bargain on the criminal side, then it is not performing its proper function."[152] In *Crane*, the prosecutor felt "the system" had cheated him out of the thirty-five year to life sentence he had earlier secured and so he sought to augment Crane's detention using a less-rigid alternative venue.[153]

Because of the ongoing availability of both criminal and civil remedies for the same sex offender, the High Court's ruling in *Crane* did not shut the door on such prosecutorial power. Instead, *Crane* merely adds another procedural hurdle for prosecutors.[154] In future cases like *Crane*, to correct the criminal justice system's perceived errors, states may again seek to use civil commitment to effectively increase a sex offender's sentence.[155] Public pressure and changing policies may also motivate states to use commitment to alter sentences and parole decisions previously determined. For example, only two thirds of convicted rapists receive a prison sentence, and of those who serve time, on average, they are released after serving only five years of a ten

151. *Crane* Supreme Court Transcript, *supra* note 91, at 18.

152. Kansas v. Hendricks, 521 U.S. 346, 373 (1997) (Kennedy, J., concurring).

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

154. Recall the Kansas Attorney General's analysis of the *Crane* ruling, i.e., that although prosecutors would have an additional element to prove, they would not need to change the evidence they present. McLean, *supra* note 137.

155. *See* NACDL Brief, *supra* note 60, at 14.

year sentence.[156] Under such circumstances, the temptation to use civil commitment as an alternative means of detaining sex offenders must be great. Yet as applied in cases like Crane's to extend criminal punishments prosecutors perceive as too weak, such selective use of commitment exposes it as a punitive measure, augmenting the criminal justice system.

Rather than openly boosting criminal penalties[157] for a disfavored class of criminals, i.e., sex offenders, states are using commitment in a manner that undermines the principle that punishment should be consistent and predictable. The Court in *Crane* did not revisit its earlier finding that civil commitment for Leroy Hendricks was not punitive. However, Hendricks evidenced a long pattern of prison releases followed by further sex crimes, and he had admitted that he could not control himself; prosecutorial abuse was not at issue in his case. By contrast, in *Crane*, the prosecutor manipulated civil commitment to effectively reinstate Michael Crane's trial sentence, implicitly overturning the Kansas Supreme Court. Now that *Hendricks* has been limited to its facts, civil commitment is clearly punitive as applied to Crane and others similarly situated when prosecutors employ it to take a "second shot" at them.

Such punitive "civil" commitment violates constitutional prohibitions against double jeopardy and ex post facto punishments that stand in the way of attempts to change the results of an earlier criminal proceeding. The Double Jeopardy Clause prohibits both prosecuting a second time for the same offense and "punishing twice, or attempting a second time to punish criminally, for the same offense."[158] The Supreme Court held that Hendricks's civil commitment proceedings did not constitute double jeopardy because they were civil in nature, and therefore the familiar *Blockburger* same-elements test did not apply.[159] However, where, as in *Crane*, a prosecutor initiates a commitment hearing as a blatant follow-on to an adverse criminal ruling, the hearing becomes part of an ongoing criminal proceeding[160] and is punitive in nature.

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156. LAWRENCE A. GREENFELD, SEX OFFENSES AND OFFENDERS: AN ANALYSIS OF DATA ON RAPE AND SEXUAL ASSAULT 14, 20 (1997), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf.soo.pdf.

157. *See infra* text accompanying notes 195-205 for argument in favor of more adaptable, and possibly longer, criminal sentences in lieu of punitive civil commitment that extends criminal detention.

158. Witte v. United States, 515 U.S. 389, 396 (1995) (emphasis omitted).

159. Kansas v. Hendricks, 521 U.S. 346, 369 (1997); *see* Blockburger v. United States, 284 U.S. 299, 304 (1932) ("[W]here the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not.").

160. In fact, many aspects of the civil commitment trial look like a criminal trial. *See supra* text accompanying note 79 (noting requirement of a finding by a unanimous jury beyond a reasonable doubt). One wonders about jurors' success at distinguishing between, on the one hand, making a determination about this past offender's future dangerousness as a

The *Blockburger* test thus applies, indicating a double jeopardy violation because commitment relies squarely on the earlier conviction (or insanity acquittal), incorporating all the elements of the earlier crime to justify the civil confinement.

Similarly, because commitment is punitive in *Crane*-like contexts, it also violates the Ex Post Facto Clause by retroactively increasing the punishment for a criminal act. Although the Court dismissed this claim in *Hendricks* because the Clause applies exclusively to penal statutes,[161] commitment in cases of prosecutorial manipulation meets the requirements for a violation of the Clause. First, it is a "new punitive measure to a crime already consummated."[162] Second, this punishment significantly "disadvantage[s] the offender."[163]

The Act particularly violates ex post facto principles in the case of those who previously pled guilty in order to secure a shorter criminal sentence than if they had gone to trial. "Now that prosecutors have received the benefit of these plea agreements . . . it would surely be contrary to 'familiar considerations of fair notice, reasonable reliance, and settled expectations'"[164] to deprive sex offenders of their liberty after having served their criminal sentences. If an accused sex offender had known that his guilty plea might lead to postprison indefinite detention, he might well have insisted on his constitutional right to a trial before a jury. The Act enables prosecutors to upset the "*quid pro quo* between a criminal defendant and the government" that is inherent in a plea agreement.[165] This reality clearly upset at least one Justice in *Crane*: "[Crane] entered a plea bargain. . . . And he got a relatively short time. And then, through this civil process, . . . [Crane] could get to the full amount of time that [he] could have been sentenced if there had been no plea bargain, and . . . the maximum penalty because this is indefinite."[166]

Moreover, sex offenders and their attorneys would surely have taken the potential for indefinite civil detention into consideration in deciding whether to

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result of his mental abnormality or personality disorder, and, on the other, reconvicting the person for his original, troubling sex crimes.

161. *Hendricks*, 521 U.S. at 370.

162. Cal. Dept. of Corrections v. Morales, 514 U.S. 499, 505 (1995) (citations omitted) (upholding as nonpunitive California's decision to defer parole hearings).

163. Weaver v. Graham, 450 U.S. 24, 29 (1981). Instituting postprison sex offender commitment prospectively, i.e., for those who have not yet perpetrated their crimes, does not violate the Clause. Persons with a degree of volitional control who perpetrate sex crimes subsequent to the Act's enactment are presumably fully aware of the potential implications of their crimes, and factor in civil commitment when deciding whether to act.

164. INS v. St. Cyr, 533 U.S. 289, 323 (2001) (invalidating, in the case of immigrants who pled guilty prior to the effective date of new legislation, the revocation of discretionary relief from deportation) (citing Landgraf v. USI Film Prods., 511 U.S. 244, 270 (1994)).

165. *Id.* at 321.

166. *Crane* Supreme Court Transcript, *supra* note 91, at 19.

plead guilty had they known of the Act, just as defendants considering an insanity defense do.

> Until the mid-1970s, unless the defendant was facing the death penalty or life imprisonment, a defense attorney would advise a client not to enter an insanity plea. Taking a chance with a prison term under a guilty plea was preferable to automatic long-term or lifetime institutionalization in a unit for the criminally insane. Trial manuals cautioned attorneys to consider the prospects of commitment before invoking the insanity defense.[167]

Indefinitely detaining a sex offender in Crane's position thus fundamentally alters the punishment agreed to in a plea agreement, violating ex post facto principles.

Clearly, civil commitment is not always punitive, as evidenced by *Hendricks*. Yet the enormous power to undo the finality of criminal sentences that prosecutors wield as a result of civil commitment's availability must be checked, for *Crane* demonstrates its very real potential for abuse. The current system gives the government tools to do an end-run around sentencing guidelines and the judgments of criminal courts. It also undermines the deterrence principle of criminal law, i.e., that would-be criminals will not act if they know the penalties are too great. Unlike statutory criminal penalties, civil commitment is likely too indeterminate a risk to affect the behavior of potential sex offenders like Crane, who despite ASP can essentially control their acts and are therefore deterrable. Although hopefully few prosecutors act as Crane's did, civil commitment—so long as it is permitted to complement, not substitute for criminal punishment—is simply too tempting a blank check to afford the government.

### C. *Civil Commitment's Potentially Bottomless Slippery Slope*

Moreover, the great power given to states by civil commitment to punitively lengthen the effective detention periods of sex offenders may be extended to additional classes of criminals. If states are permitted to continue ignoring the gist, if not the letter, of *Crane* and like precedents, there is effectively no limit to using the same rationale that underlies SVP civil commitment to broaden the scope of committable offenders.

Even if misinformed, the public's impression that certain offender groups pose a particularly serious menace to society could persuade policymakers to enact such an expansion of commitment eligibility. Apparently much of the impetus for sex offender commitment laws was rooted in the mistaken impression that sex offenders are more likely to recidivate than other

167. SLOVENKO, *supra* note 27, at 180.

criminals.[168] In fact, the opposite is true: Rapists, for example, are only half as likely (about twenty percent probability) as other violent probationers to commit a new felony within three years of release.[169]

Because the vast majority of American prisoners suffer from ASP, other personality disorders, or a "mental abnormality," virtually all convicts are potentially eligible for commitment if statutes are rewritten to apply to groups beyond sex offenders.[170] Which "hot crime" will raise enough ire to precipitate demands for stiffer retroactive punishments is anyone's guess,[171] but there is no realistic stopping point for civil commitment under current state practices. If the public became aware of the recidivism rate for those discharged from prisons (sixty percent),[172] citizens might clamor for institutionalizing all eligible convicts with personality disorders or mental abnormalities.[173] Such a broad change would make unmistakable what is already true: Civil commitment changes the nature of punishment from a system based on conviction for past offenses beyond a reasonable doubt, to one based on preventive detention justified by qualitative estimates of future dangerousness. It erects a "shadow criminal law."[174]

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168. ATSA Treatment, *supra* note 54 ("Many people . . . expect [sex offender recidivism rates] to be somewhere between eighty and ninety percent.").

169. GREENFELD, *supra* note 156, at 25-26. Only one in seven sex offenders was previously convicted of a sex crime. *Id.* at 22. There is also quite a disparity of recidivism rates between various sex offender categories. Untreated offenders who sexually abuse family members reoffend in 4% to 10% of the cases; those primarily targeting children reoffend in 10% to 40% of the cases; and those who target adult women reoffend in 7% to 35% of cases. ATSA Treatment, *supra* note 54.

170. At oral argument, a Justice asked the Kansas Attorney General what stood in the way of her extending the reach of the civil commitment laws to a broader group. Her response was that she is limited (only) by the Act's (changeable) requirement that committees be sexually violent. *Crane* Supreme Court Transcript, *supra* note 91, at 17.

171. Murderers? Burglars? Drunk drivers? Recreational drug users? Perpetrators of accounting fraud??? *See* State v. Lafferty, 472 A.2d 1275, 1278 (Conn. 1984) (involuntarily committing an embezzler, who posed a danger "in a property sense"); *see also supra* note 40.

172. SLOVENKO, *supra* note 27, at 190.

173. Of course, the financial and social costs of keeping even larger numbers of convicts detained beyond their criminal sentences could be devastating, both for state treasuries, and for the institutions, communities and, above all, families sometimes permanently deprived of their members.

174. Allen v. Illinois, 478 U.S. 364, 384 (1986) (Stevens, J., dissenting); *see* Foucha v. Louisiana, 504 U.S. 71, 82-83 (1992). In some ways, however, dangerousness-based civil commitment might be more accurate than three strikes laws at predicting which criminals pose the greatest danger to society and who therefore should, even at great cost, be removed from society. For example, a heroin addict who shoplifted nine videotapes and who had previously been convicted for several nonviolent offenses was sentenced to 50 years to life in prison under California's three strikes law. Andrade v. Attorney Gen., 270 F.3d 743, 748-49 (9th Cir. 2001), *rev'd sub nom.* Lockyer v. Andrade, 123 S. Ct. 1166 (2003). Such a result is arguably more arbitrary than asking a jury to find beyond a reasonable doubt that an offender was previously convicted and that he suffers from a mental abnormality or

At the end of 2000, there were almost 6.5 million persons incarcerated, on probation, or on parole in the United States.[175] If civil commitment's use were expanded, at some point its application would cease to be either "narrow" or applied just in "special . . . circumstances."[176] But where that point lies depends upon the basis of comparison. Even though up to eighty percent of prisoners have ASP, only three percent of males and just one percent of females in the general population suffer from the disorder.[177] Regarded from this perspective, widespread civil detention of past offenders might still be "narrow."[178]

Although the Supreme Court in *Crane* sought to limit the class of potential committees to those who lack an unspecified degree of volitional control, this class may be more inclusive than exclusive when drawn from American prisoners. The "dangerous but typical recidivist convicted in an ordinary criminal case,"[179] who may not be committed, may become ever scarcer as our understanding of the danger of mental abnormalities improves.[180] If civil commitment should indeed evolve in this direction, *Crane* will likely be seen as just a waypoint on a longer road to redefining how the American legal system deals with past criminal offenders.[181]

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personality disorder that makes him dangerous. Moreover, to the extent that three strikes laws and civil commitment both potentially result in lifetime detention based in large part on past offenses and a public fear of future dangerousness, three strikes laws are in essence a more generally applicable (i.e., not limited to sex crimes and not linked to mental abnormalities) analog of sex offender commitment statutes.

175. Bureau of Justice Statistics, Key Facts at a Glance: Correctional Populations, *at* http://www.ojp.usdoj.gov/bjs/glance/tables/corr2tab.htm (last modified Aug. 25, 2002).

176. *See* Zadvydas v. Davis, 533 U.S. 678, 690 (2001).

177. DSM-IV, *supra* note 61, at 648.

178. Of course, the Supreme Court has upheld in *Hendricks*, and reaffirmed in *Crane*, the civil commitment of dangerous persons suffering from *any* mental abnormality or personality disorder. And "[i]f you look at [the diagnostic manual], you can classify all of us under one rubric or another of mental disorder." J. Katz, *Letters to the Editor: The Physical Reality of Mental Illness*, WALL ST. J., Apr. 27, 1993, at A21 (opinion of Yale professor of law, medicine, and psychology, who advised Judge Cabranes (2d Cir.) on the definition of mental disease). As a result, the size of the commitment-eligible class could conceivably grow even further, although the comparison group of nondangerous civilians, even if they have mental disorders as well, could remain relatively static. Thus, whether the class of committable offenders remains "narrow" depends on how the question's parameters are framed.

179. Kansas v. Crane, 534 U.S. 407, 413 (2002).

180. "[T]he science of psychiatry, which informs but does not control ultimate legal determinations, is an ever-advancing science . . . ." *Id.*

181. Such an increase in the use of civil commitment would surely have very broad effects extending far beyond the treatment facilities. Among other changes, the public reputation of psychological treatment might be cheapened. "[B]y bending civil commitment to serve essentially nonmedical purposes, sexual predator commitment statutes threaten to undermine the legitimacy of the medical model of commitment." AM. PSYCHIATRIC ASS'N, *supra* note 49, at 173. Society might come to associate psychological treatment with

## V. THE LINE BETWEEN CRIMINAL AND CIVIL LAW MUST NOT BE BLURRED

### A. *States Should Use Either Criminal or Civil Proceedings to Confine an Offender, Not Both*

Clearly, the problems posed by using the civil system to carry out criminal ends are manifold. But many of them are avoidable. One solution is for states to return to the earlier model of sex offender commitment laws, whereby an accused sex offender was directed *either* to the criminal justice system or to civil commitment, but not both.[182] Under this approach, sex offender civil commitment is not punitive, for commitment is not used as additional detention following a criminal sentence. Instead, this approach seeks to identify from the beginning of the defendant's trial whether he is most appropriately treated as a criminal, with the requisite mental state, or as a civil committee, who cannot—or can only inadequately—control himself.[183] This design also allows the criminal and civil systems to be more effective by focusing on that for which each is designed, either punishment or treatment and containment.

This policy change would improve the likelihood that civil commitment of sex offenders will achieve its probable significant benefits. For example,

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criminal acts and personalities, potentially reinforcing many Americans' skepticism about and reluctance to seek psychological treatment. This in turn could weaken patient-psychiatrist trust, which is essential for successful treatment. APA Brief, *supra* note 104, at 22.

182. *See supra* text accompanying notes 44-48.

183. Thus, civil commitment provides states a constitutional means for containing sex offenders—so long as they lack the requisite degree of volitional control—even when they are outside the reach of the criminal justice system. For example, in a case involving an alleged child molester, the Court held that the Ex Post Facto Clause prevents states from reviving previously time-barred criminal prosecutions. Stogner v. California, No. 01-1757, slip op. at 25 (U.S. June 26, 2003). Like *Crane*, *Stogner* shows that—in spite of victims' suffering and often heartbreaking pleas for justice—the Supreme Court will not countenance states' unchecked pursuit of sex offenders who may no longer be criminally incarcerated under conventional approaches.

But even in light of the Court's unwillingness to create exceptions to traditional principles of criminal justice, states retain a viable method for confronting many newly accused sex offenders from years past: Where an accused poses an ongoing danger because he lacks sufficient volitional control, he may be civilly committed for treatment and containment until he no longer threatens the public, regardless of an expired criminal statute of limitations. Importantly, a commitment hearing may provide victims a trial-like setting in which to confront their abusers and where they can witness the state wielding its powers to remove from society a man they may still fear. Such an approach is clearly constitutional because commitment is in lieu of, not in addition to, criminal punishment, and because it comports with the conventional justifications for civil commitment. Of course, commitment may not be used in cases where the accused possesses sufficient volitional control and whose punishment must therefore fit within the constraints of the traditional criminal justice system.

commitment may yet lead to greater efforts to treat sex offenders. These efforts may successfully rehabilitate sex offenders who otherwise would have recidivated, and may also lead to the development of more effective treatments.

Furthermore, channeling treatable offenders directly into a civil commitment environment designed to address their needs would ameliorate the chief constitutional flaws in the current system. This separation of the criminal and civil systems would prevent prosecutors from threatening the finality of criminal sentences with postprison punitive commitment.

This division would also address Justice Breyer's argument that the Act is punitive because, even where the state believes treatment is available, state law requires a delay until the end of criminal incarceration before an offender may be treated.[184] This state practice necessitates further loss of liberty via civil commitment.[185] In Crane's case, although he participated in group therapy while in prison, he was not offered sex offender treatment.[186]

If Crane was sufficiently unable to control his behavior so as to warrant his postprison civil commitment, he may have lacked the requisite mental state for the crimes alleged,[187] and he should have been sent immediately not to a prison, but to a commitment facility, where his treatment could—at least theoretically—have begun. A civil commitment scheme that actually treats an offender and holds him only so long as he is dangerous is preferable to criminally punishing someone who is not in complete control of, and therefore not fully responsible for, his actions.

Unfortunately, even during civil commitment, some states currently make few efforts to treat offenders, limiting the possibility that committees will ever be cured or made eligible for release. Instead, the commitment facilities appear to focus solely on community protection. In 2001, the Supreme Court rejected an "as applied" challenge to the commitment conditions in Washington State. Instead, the Court deferred to the state supreme court, which had found that commitment was civil and nonpunitive by relying on the commitment law's text and legislative history, not its application.[188] The Court's opinion nonetheless cited evidence that after years of operation under a court order requiring improved conditions, the facility still lacked certified treatment

184. Except Kansas, every state with a sex offender commitment law either permits treatment during prison or considers alternatives to commitment. Kansas v. Hendricks, 521 U.S. 346, 388 (1997) (Breyer, J., dissenting).

185. *Id.* at 381 (Breyer, J., dissenting).

186. APA Brief, *supra* note 104, at 3 n.2 (citing Joint Appendix at 17).

187. *See supra* Part IV.A.

188. Seling v. Young, 531 U.S. 250, 262-63 (2001). The Court did, however, reserve judgment on whether Washington's civil commitment procedures would have been found unconstitutionally punitive if the case had been one of first impression. *Id.* For the Washington Supreme Court's opinion on commitment's civil nature, see *In re Young*, 857 P.2d 989, 998-99 (Wash. 1993).

personnel, and release continued to be impossible.[189] Notwithstanding the Court's present distaste for permitting judges to micromanage prison (and, apparently, mental-institution) administration, such state inaction suggests a punitive intent. Moreover, countenancing such defiance of a federal judge's order that the state must, as promised, offer treatment[190] debases the *parens patriae* principle on which the denial of liberty to committed sex offenders is in part based.

Real treatment in a secure, hospital-like setting must be provided to civilly institutionalized sex offenders so that they have every opportunity of overcoming their disorders and, if successful, being safely reintroduced into society. Put simply, committees should not be treated as prisoners; the conditions of their confinement should be geared towards recovery, not mere incapacitation.[191] Offering real treatment opportunities would also defuse key constitutional arguments for why commitment is punitive, and would ensure that contemporary civil detention more closely hews to the traditional models (and accompanying legal precedents), which recognize treatment as a central focus of commitment that is civil, not criminal.[192]

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189. *Young*, 531 U.S. at 260 (citing the conclusions of a court-appointed resident advocate and psychologist, who determined "that because the Center had not fundamentally changed over so many years, he had come to suspect that the Center was designed and managed to punish and confine individuals for life without any hope of release to a less restrictive setting").

190. *Id.* at 257.

191. In Kansas, sex offender committees are held in the psychiatric wing of a prison hospital, where prisoners and committees are treated the same. Kansas v. Hendricks, 521 U.S. 346, 379 (1997) (Breyer, J., dissenting) (citing state administrator's testimony).

192. If legislatures do not implement these proposed changes and instead maintain the current system in which sex offenders may be channeled first into criminal and then into civil detention, states should nonetheless offer effective treatment in prisons, which few currently do. Abel & Rouleau, *supra* note 45, at 271. In order to maximize long-term public safety, incarceration should be used not only for the retributive and deterrent purpose of depriving convicts of their liberty, but also for the rehabilitative purpose of working to make offenders less dangerous once released. As Justice Breyer argued, providing treatment during incarceration does not lessen prison's deterrent effects, since treatment can often be delivered within the normal prison environment. *Hendricks*, 521 U.S. at 386-87 (Breyer, J., dissenting).

A government-sponsored study recently identified various treatments that can reduce recidivism in offenders generally, not just sex offenders. *See* Doris L. MacKenzie, *Criminal Justice and Crime Prevention*, *in* LAWRENCE W. SHERMAN, DENISE GOTTFREDSON, DORIS MACKENZIE, JOHN ECK, PETER REUTER & SHAWN BUSHWAY, PREVENTING CRIME: WHAT WORKS, WHAT DOESN'T, WHAT'S PROMISING ch. 9 (1997), *available at* http://www.ncjrs.org/works/wholedoc.htm. Offering such treatments would be a wise public investment. A study estimated that offering sex offender treatment in prisons would increase the cost of SVPs' sentences 20%. *See* ATSA Treatment, *supra* note 54. However, society's return on those treatment dollars would include the immeasurable future benefit of having fewer victims of sex offenses. Of course, those whom treatment cannot help, such as ASP sufferers, should not be treated.

However, for those not responsive to treatment but who nonetheless pose an ongoing public danger following criminal incarceration, states should carefully weigh the economic and social costs of imposing potentially lifelong civil detention, which creates quandaries for medical professionals regarding their ethical duties, and overrides offenders' liberty interests.[193] States may need to free such sex offenders, taking the same risks with them that they do with virtually all other criminals who have paid their debts to society and have been "rehabilitated" by the correctional system. Just as with other criminals released from prison, some sex offenders will invariably recidivate, but many will not.[194] This is one of the unavoidable realities of our criminal justice system based upon convictions for past acts that are proved beyond a reasonable doubt.

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Failure to offer treatment to incarcerated sex offenders effectively forces many SVPs into civil commitment who otherwise might already have been cured. *See* Ass'n for the Treatment of Sexual Abusers Executive Bd. of Dirs., *Civil Commitment of Sexually Violent Offenders* (adopted March 20, 2001) [hereinafter ATSA Civil Commitment], *available at* http://www.atsa.com/ppcivilcommit.html. Withholding treatment in prison also forces the public purse to bear the significant cost of detaining civil committees who might otherwise not have warranted commitment, had they been treated while incarcerated, when the state was already paying to detain the offender. Furthermore, committing only those offenders who had not responded to treatment in prison would presumably result in fewer committees, potentially unburdening commitment facilities and allowing more attention to be focused on those offenders with the greatest treatment needs. Moreover, those sex offenders who could be treated in prison, but are not, and who are not committed and subsequently recidivate, harm victims with acts that might have been prevented. Therefore, rather than de facto requiring later punitive civil commitment by withholding effective treatment from offenders while they are already under state control, states that do not implement the above-proposed reforms should nonetheless use the correctional system to "correct" SVPs by offering treatment within prisons. This would protect committees' postprison liberty interests, as well as public safety and state budgets.

193. *See supra* note 173 (costs); text accompanying notes 29-31 (liberty interests). It violates medical ethics for a doctor to inflict "treatment" that does not benefit the patient, which may be the case for institutionalized sex offenders with antisocial personalities. "[C]onfinement without a reasonable prospect of beneficial treatment of the underlying disorder is nothing more than preventive detention and violates the norms of the medical model." AM. PSYCHIATRIC ASS'N, *supra* note 49, at 175. Thus, a doctor may not for public policy reasons take charge of a person who is untreatable.

> A doctor must have complete clinical independence in deciding upon the care of a person for whom he or she is medically responsible. The doctor's fundamental rule is to alleviate the distress of his or her fellow men, and no motive—whether personal, collective or political—shall prevail against this higher purpose.

World Med. Ass'n, *Declaration of Tokyo*, princ. 4 (1974), *cited in* SLOVENKO, *supra* note 27, at 366 n.26. Instead, the American Psychiatric Association says that where treatment is not possible, but confinement is still necessary, a person should be held at "the most appropriate nonhospital facility," which implies a prison. *American Psychiatric Association Statement on the Insanity Defense*, 140 AM. J. PSYCHIATRY 681, 687 (1983); *see* SLOVENKO, *supra* note 27, at 182 ("Given the cutback in mental hospitals, many mentally ill persons with no criminal charges against them are housed in jails. In a survey of 3,353 jails in the United States, 29 percent admit to this practice.").

194. *See supra* notes 168-69 and accompanying text.

### B. *States Should Enact More-Adaptable—and Possibly Longer—Criminal Sentences*

Another solution preferable to imposing indefinite punitive civil detention and institutionalizing convicts who cannot be treated would be for states to lengthen sex crime penal sentences. This step would decrease pressure on prosecutors to use commitment to increase SVPs' detention periods, which in turn would serve to maintain the historic division between civil and criminal confinement.[195] "The concern [is not whether a sex offender should serve a life sentence, but] instead is whether it is the criminal system or the civil system which should make the decision in the first place."[196]

If a sex offender cannot be treated and will effectively live in the same conditions as a prisoner,[197] then a state might as well dispense with the charade and actually punish the offender with a longer criminal sentence. Thus, offenders likely to recidivate should be sentenced to a confinement period adequate to protect society. If the current sentencing range is not large enough to serve this purpose, states should enact longer maximum sentences. Of course, such punishment can only be meted out prospectively, which alludes to one of the reasons surely underlying the passage of sex offender commitment statutes: States became convinced that sex offenders already sentenced were not being adequately punished or detained.[198] However, if states were to address their adequacy-of-punishment concerns only through prospective criminal punishment, they would avoid doubts surrounding the constitutionality of sex offender commitment. And going forward, sex offenders increasingly would serve longer sentences, giving states an alternative means of achieving the control they seek over the sex offender population.[199]

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195. This approach would also keep those with ASP, who are often very disruptive to institutional treatment environments, in a prison setting better able to confront their difficult behavior. ASP convicts are often those who lead prison riots, disobey regulations, spread the convict code, traffic in drugs, and spend a disproportionate amount of time in solitary confinement. Peter Suedfeld & P. Bruce Landon, *Approaches to Treatment*, *in* PSYCHOPATHIC BEHAVIOUR: APPROACHES TO RESEARCH 347, 358 (R. D. Hare & D. Schalling eds., 1978). Nonetheless, it is better to keep the worst offenders with ASP in prisons via the use of extended or more adaptable sentences, rather than letting them loose on treatment environments or the community at large, thus "maintaining the safety of the latter at the expense of the freedom of the former." *Id.* at 359.

196. Kansas v. Hendricks, 521 U.S. 346, 373 (Kennedy, J., concurring).

197. Recall that in Kansas, sex offenders and prisoners are both held at a prison facility, where they are treated the same. *Id.* at 379 (Breyer, J., dissenting) (citing state administrator's testimony); *see supra* note 191.

198. Following the rape and murder of Stephanie Schmidt, the Kansas college student, the state legislature first significantly increased criminal penalties. The civil commitment law was a follow-on measure. *See* Stovall, *supra* note 55, at 1-2.

199. Besides simply lengthening sentences, states should continue their efforts to make sure that sex crimes are vigorously prosecuted. Over the past 20 years, sex crime convictions have increased significantly, based predominantly on higher victim reporting

However, before states rush to extend sex crime sentencing ranges, they should ensure that their existing laws are being applied consistently and strictly to dangerous sex offenders. As of 1993, most sex offenders served only half their sentences; the average rapist served only five years of a ten-year sentence.[200] Only two percent of rapists in 1992 got a life sentence, and only two thirds of convicted rapists were even sentenced to prison.[201] From 1985 to 1993, the national average sentence given to sex offenders entering prison hardly changed.[202] Insofar as one aim of commitment is to deter offenders who, like Crane, have some volitional control, consistently strictly enforced criminal sentencing guidelines would serve this purpose while still protecting the community.[203] In fact, highly probable, longer sentences could prove to be more effective deterrents than the less-concrete possibility of postprison commitment.

States should also consider amending parole procedures for sex offenders deemed likely to recidivate. By evaluating a convicted sex offender prior to sentencing, special conditions may be attached to the termination of the criminal sentence.

> Granting parole or any type of early release would be related directly to progress in treatment and other measures of reduced recidivism risk. The option of long-term or life-long specialized parole and probation could also serve as an appropriate method of managing highest risk offenders and could serve as an alternative to civil commitment where appropriate.[204]

Imposing longer and more adaptable criminal sentences in lieu of postprison civil commitment would put control over criminals' fates back in the hands of parole boards, which exist to make decisions such as whether a sex offender poses an ongoing public danger. This change would simultaneously relieve mental health specialists of both the ethical quandaries posed by "treating" untreatable patients, and the problem of turning doctors into jailers.[205]

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rates and greater success in the courtroom, rather than on a dramatic increase in such offenses. Between 1980 and 1994, the number of sex offenders in state prisons increased 330% to 88,000. GREENFELD, *supra* note 156, at 17. During the same period, sexual assaults other than rape accounted for the second highest growth rate (15% annually) in the number of state prisoners, outpaced only by drug offenses (18%). *Id.* at 18. Nonetheless, experts believe only one third of all rapes and sexual assaults are reported to police. *Id.* at 2.

200. *Id.* at 20.

201. *Id.* at 14.

202. *Id.* at 19.

203. Even otherwise-untreatable ASP sufferers may be driven by the threat of incarceration to change their behavior and seek professional help. BLACK, *supra* note 52, at 128.

204. ATSA Civil Commitment, *supra* note 192.

205. APA Brief, *supra* note 104, at 22.

## EPILOGUE AND CONCLUSION

On January 22, 2002, the United States Supreme Court rendered its judgment in *Crane*, sending the case back to the Kansas high court to muddle through the majority's "generally stated constitutional standards and objectives" in order to determine how to apply the case to Michael Crane.[206] Three days later, Crane was set free. Ironically, however, he was conditionally released not because of a decision reached by jurists in the nation's capital, but rather on account of a determination made by doctors in Kansas. In October 2001, psychiatrists had found Crane ready for transitional release, and had sent him from the state high-security hospital to a halfway house, where he got a job and received further treatment. By January, doctors were convinced that Crane no longer posed a threat to the community. Upon release, Crane agreed to continue meeting with a therapist and to join a group like "Sexaholics Anonymous." He said, "I want people to feel comfortable around me." Crane was just the third man to be conditionally released from the state's sex offender civil commitment program.[207]

By only permitting commitment under the Act of dangerous sex offenders who suffer from some lack of volitional control, the Supreme Court attempted to force civil commitment back into the "mental disability" slot, rather than allowing it to spill over into the "general criminal conduct" catchbasin. Significantly, *Crane* represents a fundamental change from earlier precedents. A seven-Justice majority stands behind this decision's attempt to limit *Hendricks* and its sweeping grant of authority to states to do what they want under the mantra of civil commitment. The Court has now sent a message to states that they need to tread carefully in applying civil commitment. Currently, however, states appear reluctant to take the Court's hint.

Only time will tell if the treatment Crane received while at Larned State Security Hospital actually made him less dangerous.[208] Similarly, only history will judge the success of the Supreme Court's recent attempt to place limits on civil commitment laws. Although little is certain after *Crane*, one thing seems clear: The Court has awakened to the possibility that civil commitment could reshape our criminal justice system. Before *Crane*, states were laying the groundwork for a system in which those who can control their behavior could

206. Kansas v. Crane, 534 U.S. 407, 414 (2002).

207. Rizzo, *supra* note 102, at B1.

208. "When such [ASP] patients [with severe psychopathy, e.g., criminals] are ordered into forensic hospitals by the courts, strict behavioral controls should be used to manage behavior, and any clinical improvement should be viewed with great skepticism." Meloy, *supra* note 52, at 2259

As this Issue was going to press, Michael Crane had just been arrested for committing another sex offense. He was charged with kidnapping, forcible rape, assault and three counts of forcible sodomy for a March 2003 attack. Joe Lambe, *'Cured' Sex Predator Is Charged with Rape*, KAN. CITY STAR (Metropolitan ed.), June 20, 2003, at A1.

be held for crimes they had yet to commit. While the Court rejected this premise, there remain numerous hooks that states may yet latch onto in order to incapacitate feared classes of offenders who would otherwise be beyond the government's grasp.[209] It seems probable that, if once again necessary, this Supreme Court—which has been stern with criminal offenders in many contexts—will nonetheless reject egregious deviations from the presumption that only those found guilty beyond a reasonable doubt may be denied their liberty.

209. For instance, California essentially rescinded the statute of limitations for sex-related child abuse, even in cases where it had already expired. In its recent *Stogner* decision, the Supreme Court refused to countenance the state's deviation from traditional constitutional principles of criminal law to accomodate the pursuit of sex offenders. The Court stressed the danger posed to the overall criminal justice system by permitting exceptional rules for a particularly loathed type of accused. "[A] constitutional principle must apply not only in child abuse cases, but in every criminal case. And, insofar as we can tell, the dissent's principle would permit the State to revive a prosecution for *any* kind of crime without *any* temporal limitation." Stogner v. California, No. 01-1757, slip op. at 24 (U.S. June 26, 2003).