Protecting Life and Liberty: The Constitutionality and Necessity of Civil Commitment of Sexual Predators

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PROTECTING LIFE AND LIBERTY:  
THE CONSTITUTIONALITY AND NECESSITY OF  
CIVIL COMMITMENT OF SEXUAL PREDATORS  

INTRODUCTION

Before the revival of “sexual psychopath” laws less than a decade ago, the State of Washington was forced to release Earl Shriner from prison.1 Shriner's criminal tirade spanned more than two decades.2 At the age of sixteen, he killed a schoolmate.3 He was later released from a mental institution, only to kidnap and rape two teenage girls.4 While incarcerated for those acts, Shriner told an inmate of his desire to own a van with cages in order to molest, torture, and murder children.5 Anxiously awaiting his release from prison, Shriner kept a diary detailing his criminal plans of torture and murder.6

Shriner was not eligible for civil commitment under Washington's general civil commitment law, which required mental illness and a recent overt act.7 So, after serving a ten-year sentence, the state released Shriner, freeing him to commit his most brutal crime yet.8 He kidnapped, raped, strangled, and then sexually mutilated a seven-year-old boy who was riding his bike around the neighborhood.9

Shortly after the citizens of Washington were shocked by this unthinkable crime, the government acted to ensure this type of brutality never happened to one of its children again.10 Washington enacted the first modern law providing for the involuntary civil commitment of sexual predators.11 Several state legislatures have followed suit, motivated largely by the public’s concern for the protection of innocent children.12

3. Id.
4. Id.
6. Id.
7. Id.
8. Id.
9. Id.
12. See Seling, 531 U.S. at 254 (noting that the Washington State Community Protection Act was enacted in response to citizens' concerns about laws dealing with sexually violent offenders).
Several scholars have sharply criticized these laws as unconstitutional. In fact, the majority of commentary available on the subject asserts that these laws are fundamentally opposed to the American notion of rights to "life and liberty." This Comment argues that the contrary is true: these laws protect and defend the rights of society to life and liberty. These laws, though imperfect, are a necessary step toward preventing brutal sexual crimes from being repeated by individuals who escape the system.

Part II of this Comment begins by describing the problem of sexual violence in America. Part II also examines the solution of civil commitment posed by many states in response to this group of predators and provides the United States Supreme Court's position on the constitutionality of these sexual predator laws. This section also includes a discussion of the Kansas Supreme Court's and United States Supreme Court's decisions in a recent sexual predator case, In re Crane. Part III offers an analysis of judicial decisions in this area of law and addresses common arguments opposing civil commitment. Finally, Part IV explores the impact of the United States Supreme Court's recent decisions on the future of civil commitment of sexually violent predators.

II. BACKGROUND

In order to understand why special laws are needed to address the problem of sexually violent predators, some explanation is required. This section will briefly discuss the problem of sexual violence in

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16. See infra notes 21-34 and accompanying text.

17. See infra notes 35-53 and accompanying text.

18. See infra notes 54-180 and accompanying text.

19. See infra notes 181-251 and accompanying text.

20. See infra notes 252-265 and accompanying text.
America and will examine the sexually violent predator laws in detail. Supreme Court decisions on the subject will also be discussed in order to provide a background upon which to proceed with the legal discussion of these laws.

A. The Problem of Sexual Violence in America

The problem of sexual violence in our society has grown to alarming numbers. In 1995 alone, almost 355,000 rapes and sexual assaults were reported in America. Surprisingly, this number only includes those reports by victims over the age of twelve and is estimated to be significantly smaller than the number of actual assaults, given the vast underreporting unique to sexual crimes. In 1994, nearly 100,000 inmates were incarcerated for rape or sexual assault, almost half of them for victimizing children. In addition, 134,000 other sex offenders were either on probation or parole that year. From 1980 to 1994, sex offenders was the fastest-growing category of violent criminals.

Aside from the severity of the problem, sex offenders as a group pose particular problems for the traditional criminal justice system. For example, although imprisoning sex offenders may satisfy the retribution goal of incarceration, the goal of deterrence is often not achieved by time served in prison. This is because many sex offenders are affected by a mental abnormality or illness, which inhibits their self-control and thus makes deterrence unlikely.

Upon re-entering society after incarceration, sex offenders are much more likely to repeat a sexual crime than any other type of felon

22. See SEX OFFENSES AND OFFENDERS, supra note 21.
25. See SEX OFFENSES AND OFFENDERS, supra note 21, at 15.
26. Id. at 18.
27. See id. at 15. It is clear from the statistics offered by the Department of Justice that sex offenders repeatedly find themselves within the criminal justice system, given their high rate of recidivism. Id.
28. Id. This discussion refers to specific deterrence (when a punishment has the effect of preventing a specific criminal from committing another crime himself) rather than general deterrence (when a punishment for one criminal has the effect of preventing others from committing the same crime), which is not addressed in this Comment.
29. Id.
is to repeat his or her original crime. In fact, estimates of recidivism for untreated sex offenders have been as high as eighty percent. Although eighty percent is on the high end of estimates, the rate consistently reached in studies hovers between fifty and sixty percent. These numbers must also be considered in context: there is only a 3% chance of being apprehended for child molestation, and each adult homosexual pedophile has an average of 150 victims.

Before modern sexual predator laws were enacted to civilly commit such individuals, state correctional facilities released these predators into society. States stood by helplessly, waiting for the predators to re-offend so the criminal justice system could intervene again. The previous system was ineffective at handling the unique problem of sexual predators, and several states searched for an answer.

B. The Most Recent Solution

That answer came in the form of resurrected "sexual psychopath" laws, now labeled "sexually violent predator" laws. These laws, enacted largely in the 1990s, sought to commit sexually dangerous criminals to mental health facilities for treatment and rehabilitation

30. See Sex Offenses and Offenders, supra note 21, at 27; A.J. Beck et al., U.S. Dep't of Justice, Bureau of Justice Statistics, Recidivism of Prisoners Released in 1983 at 6 (1997) (noting that rapists are ten and one half times more likely than non-rapists to be re-arrested for a similar crime, while other sex offenders were seven and one half times more likely than non-sex offenders to be re-arrested). It should be noted, however, that even these shocking numbers are presumed to be significant underestimates, given the lack of reporting often associated with sexual crimes.


34. See Siegel, supra note 1.

35. Sexual psychopath statutes, which were enacted by thirty states and the District of Columbia by 1958, sought to protect society and rehabilitate sex offenders. See Alan H. Swanson, Sexual Psychopath Statutes: Summary and Analysis, 51 J. Crim. L. & Criminology Sci. 215, 215 (1960). The statutes, which viewed sex offenders as neither normal nor legally insane, attempted to remedy the problem of sexual crimes by committing sex offenders for indeterminate periods of time, until either treatment was complete, or the patient was safe to be at large. Id. See also J. Harper Cook, Civil Commitment of Sex Offenders: South Carolina's Sexually Violent Predator Act, 50 S.C. L. Rev. 543 (1999). Courts, though often criticized, never struck down these statutes on constitutional grounds. See, e.g., Minnesota ex rel. Pearson v. Probate Court. 309 U.S. 270 (1940); People v. Sims, 47 N.E.2d 703 (III. 1943); People v. Chapman, 4 N.W.2d 18 (Mich. 1942). Nonetheless, most were repealed by the 1970s for political reasons.
and to protect society from the dangers posed by these individuals.\textsuperscript{36} The period of confinement under such laws is indefinite, as the progress of treatment cannot be determined with specificity at the outset.\textsuperscript{37}

Washington was the first state to enact a sexually violent predator law, and many other states soon followed.\textsuperscript{38} Kansas's statute, the Kansas Sexually Violent Predator Act (Kansas Act), was closely patterned after Washington's and will be discussed throughout this Comment. Under the Kansas Act, a trial must be held in order to determine if a person is a sexually violent predator; that is, whether that person "has been convicted of or charged with a sexually violent offense and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in repeat acts of sexual violence."\textsuperscript{39} Throughout the trial, the person being examined is afforded many of the rights associated with a criminal proceeding.\textsuperscript{40} These rights are in place to ensure the presence of as many safeguards as possible during a proceeding that has far-reaching consequences.\textsuperscript{41}

\begin{itemize}
\item \textsuperscript{36} \textit{KAN. STAT. ANN.} § 59-29a01 (Supp. 2002).
\item \textsuperscript{37} \textit{Jones v. United States}, 463 U.S. 354, 368 (1983) (noting "because it is impossible to predict how long it will take for any given individual to recover—or indeed whether he ever will recover—Congress has chosen . . . to leave the length of commitment indeterminate, subject to periodic review of the patient's suitability for release). \textit{See also KAN. STAT. ANN.} § 59-29a07.
\item \textsuperscript{38} \textit{National Ass'n of Attorneys General, Criminal Law, Juvenile Justice & Crime Prevention Survey, Sixth Annual NAAG Self-Report from the States A-9} (1999) (noting that, as of 1999, at least seventeen states and the District of Columbia had statutes providing for the civil commitment of sexually violent predators).
\item \textsuperscript{39} \textit{KAN. STAT. ANN.} § 59-29a02. The definition of sexually violent predator includes people who have been charged with a sexual offense. \textit{Id.} However, this only applies if the person has been determined to be incompetent to stand trial pursuant to Kansas state law. \textit{Id.} Other persons eligible for commitment proceedings include those found not guilty of a sexually violent offense by reason of insanity and persons found not guilty of a sexually violent offense, but where the jury answered in the affirmative the special question asked pursuant to \textit{section 22-3221 of the Kansas Code} (asserting special jury question, "Do you find the defendant not guilty solely because the defendant, at the time of the alleged crime, was suffering from a mental disease or defect which rendered the defendant incapable of possessing the required criminal intent?"). \textit{Id.} § 59-29a03. The Act defines "mental abnormality" as "a congenital or acquired condition affecting the emotional or volitional capacity which predisposes the person to commit sexually violent offenses in a degree constituting such person a menace to the health and safety of others." \textit{Id.} § 59-29a02. "Likely to engage in repeat acts of sexual violence" means the person's propensity to commit acts of sexual violence is of such a degree as to pose a menace to the health and safety of others." \textit{Id.} "Sexually motivated" means that one of the purposes for which the defendant committed the crime was for the purpose of the defendant's sexual gratification." \textit{KAN. STAT. ANN.} § 59-29a02.
\item \textsuperscript{40} \textit{KAN. STAT. ANN.} §§ 59-29a01 – 59-29a20.
\item \textsuperscript{41} The controversy surrounding the fact that so many rights are afforded defendants in these proceedings will be discussed in Part III. \textit{infra} notes 181-251 and accompanying text.
1. Procedure

When the State wishes to have a person determined a sexually violent predator, several procedural hurdles must be cleared before commitment can be ordered. A petition must first be filed with the court. A judge then determines whether there is probable cause to believe that the named person is a sexually violent predator. If probable cause is present, the court will order that the person be taken into custody. Within seventy-two hours, the person in custody will be notified of a hearing where he or she may contest the finding of probable cause. If probable cause is confirmed, the person will be subjected to a professional evaluation prior to trial. A trial follows, and if the fact-finder determines the person to be a sexually violent predator beyond a reasonable doubt, the person will be taken into custody by the Secretary of Social and Rehabilitative Services for “control, care and treatment until such time as the person’s mental abnormality or personality disorder has so changed that the person is safe to be at large.”


43. KAN. STAT. ANN. § 59-29a04.

44. Id. § 59-29a05. Note that only certain sexual offenses make a person eligible for commitment under the Sexually Violent Predators Act. Id. §59-29a02(e). These crimes are:

1. rape;
2. indecent liberties with a child;
3. aggravated indecent liberties with a child;
4. criminal sodomy;
5. aggravated criminal sodomy;
6. indecent solicitation of a child;
7. aggravated indecent solicitation of a child;
8. sexual exploitation of a child;
9. aggravated sexual battery;
10. aggravated incest;
11. any conviction for a felony offense in effect at any time prior to the effective date of this act, that is comparable to a sexually violent offense as defined in subparagraphs (1) through (11) or any federal or other state conviction for a felony offense that under the laws of this state would be a sexually violent offense as defined in this section; (12) an attempt, conspiracy or criminal solicitation of a sexually violent offense; or (13) any act which either at the time of sentencing for the offense or subsequently during civil commitment proceedings pursuant to this act, has been determined beyond a reasonable doubt to have been sexually motivated.

Id.

45. Id. § 59-29a05.

46. Id. At the probable cause hearing, the detained person has the following rights: (1) to be represented by counsel; (2) to present evidence on his or her own behalf; (3) to cross-examine witnesses testifying against him or her; and (4) to view and copy all reports and petitions in the court file. Id.

47. KAN. STAT. ANN. § 59-29a05.

48. Id. § 59-29a06. The defendant shall be examined by a professional of his or her choosing upon request. At trial, either party may request a jury. If a jury is chosen, the determination as to the defendant's status as a sexual predator must be unanimous. Id. § 59-29a07. See generally Brakel & Cavanaugh, supra note 42; Donna Cropp Bechman, Sex Offender Civil Commitments: Scientists or Psychics?, 16-SUM CRIM. JUST. 24 (2001) (explaining modern methods of determining likelihood of re-offending).
2. The Number of Individuals Committed

The Kansas legislature, as well as the legislatures of other states, proclaimed its resolve to protect society from a small but "extremely dangerous group of sexually violent predators." The Kansas Act was written to address a very specific population of predator, and, as discussed above, several procedural safeguards were put in place to ensure the law be implemented as intended. Preliminary figures indicate that the goal of committing only the "worst of the worst" is being achieved. In fact, less than two percent of sex offenders incarcerated in Kansas have been civilly committed. The numbers vary among other states with similar laws, but all states have committed between just one and ten percent of their sex offenders since these laws were enacted several years ago. Although not determinative, these figures tend to show that the states are respecting the heavy burden the law requires for the involuntary civil commitment of sexual predators.

C. The United States Supreme Court Upholds Civil Commitment for Sexual Predators

On numerous occasions, the United States Supreme Court has addressed civil commitment generally, as well as commitment of sexual predators specifically, and has consistently held the concept of civil commitment constitutionally sound. The Supreme Court has identified two primary purposes or justifications for the involuntary civil commitment of citizens. First, under parens patriae powers, states have a legitimate interest in treating mentally deficient citizens. Second, states have a responsibility to protect society from dangerously ill individuals pursuant to state police power. Both of these purposes are implicated within the context of dealing with sexually violent predators, as all such predators suffer from mental illness or personality disorders and their violent acts certainly pose a danger to society.


50. Id.

51. See Brakel & Cavanaugh, supra note 42, at 81.

52. Id. at 79-81.

53. Id.


55. Addington, 441 U.S. at 426; Jones, 463 U.S. at 361.

56. Addington, 441 U.S. at 426.

57. Id.

58. All sexually violent predators suffer from such disorders, as a disorder must be found before an individual fits the definition of a sexually violent predator under the statute. Kan. Stat. Ann. §§ 59-29a01 - 59-29a20.
Although the Court recognizes these compelling justifications, the possible loss of liberty these individuals face requires strict constitutional safeguards to prevent unnecessary commitment. A discussion of the following Supreme Court decisions outlines the constitutional requirements the Court has set forth for civil commitment of sex offenders.

1. Addington v. Texas

Addington was critical in shaping modern requirements for involuntary civil commitment. This 1979 decision determined that the “clear and convincing” standard of proof was appropriate for indefinite commitment proceedings. Although not a sexual predator, Addington was committed several times due to mental illness. He was found to be mentally ill and a potential danger to himself or others by “clear, unequivocal, and convincing” evidence. The Court held that a standard above “preponderance of the evidence” was required for commitment, even though the proceeding was civil in nature, due to the significant liberty interest at stake. The Court noted that “loss of liberty calls for a showing that the individual suffers from something more serious than is demonstrated by idiosyncratic behavior,” and increasing the standard of proof guards against inappropriate commitments. However, the “reasonable doubt” standard invoked in criminal proceedings was likewise inappropriate, given that commitment was not punitive in nature, but rather focused on providing care for ill individuals. Further, the Court expressed concern that a burden so high might “completely undercut its efforts to further the legitimate interests of both the state and the patient that are served by civil commitments.”

59. Addington, 441 U.S. at 426.
60. Id. at 418.
61. Id. at 420.
62. Id. at 421.
63. Id. at 427.
64. Id. Note that in Jones v. United States, the Court explained that when a person is proven to have committed a criminal act due to mental illness, any civil commitment thereafter would ensure that the individual was not being confined based on “idiosyncratic behavior,” as a “criminal act by definition is not ‘within a range of conduct that is generally acceptable.’” Jones, 463 U.S. at 367 (quoting Addington, 441 U.S. at 427).
65. Addington, 441 U.S. at 428-30. “The State of Texas confines only for the purpose of providing care designed to treat the individual.” Id. at 428 n.4.
66. Id. at 429. “Given the lack of certainty and the fallibility of psychiatric diagnosis, there is a serious question as to whether a state could ever prove beyond a reasonable doubt that an individual is both mentally ill and likely to be dangerous.” Id. A reasonable doubt standard may “impose a burden the state cannot meet and thereby erect an unreasonable barrier to needed medical treatment.” Id. at 432.
involuntarily confined for an indefinite period with the state’s interest in providing care for the individual and protecting other citizens, the Court concluded that an intermediate standard adequately encompassed the relevant concerns. This opinion is often cited for support of the position that civil confinement of sexual offenders is not a criminal sanction.

2. Allen v. Illinois

In an early case concerning the civil commitment of sex offenders, the Supreme Court upheld the Illinois Sexually Dangerous Persons Act (Illinois Act) as civil in nature for purposes of the Fifth Amendment’s protection against compulsory self-incrimination. Petitioner Terry B. Allen was charged with committing the crimes of unlawful restraint and deviate sexual assault. After his indictment, the State petitioned to have him declared a sexually dangerous person under the Illinois Act. Both examining psychiatrists testified that Allen was mentally ill, possessed criminal propensities to commit sexual assaults, and demonstrated such propensities through his prior criminal acts. Upon commitment, Allen appealed, claiming he was forced to answer incriminating questions during his psychiatric evaluations in violation of his Fifth Amendment rights. The Court held that because the Illinois Act was civil in nature, as demonstrated by a variety of criteria, the Fifth Amendment did not apply to the proceeding for commitment.

The legislature explicitly characterized the Illinois Act as civil in nature and, therefore, only upon the “clearest proof that the statutory scheme is so punitive . . . as to negate the State’s intention” that the proceeding be civil will it be deemed criminal. Given that the statute obligated the State to provide “care and treatment for persons

67. Id. at 431.
68. See generally Hendricks, 521 U.S. 346.
70. Id. at 365.
71. Id. The Illinois Act defines sexually dangerous persons as: “All persons suffering from a mental disorder, which . . . has existed for a period of not less than one year, . . . coupled with criminal propensities to the commission of sex offenses, and who have demonstrated propensities toward acts of sexual assault or acts of sexual molestation of children.” Illinois Sexually Dangerous Persons Act, ILL. COMP. STAT. ANN., ch. 205, 205/1.01 (1998).
73. Id. at 367.
74. Id. The Court observed that “the State’s interest in treating, and protecting the public from, sexually dangerous persons would be ‘almost totally thwarted’ by allowing those persons to refuse to answer questions posed in psychiatric interviews . . . .” Id.
75. Id. at 369.
adjudged sexually dangerous designed to effect recovery in a facility set aside to provide psychiatric care” and provided that upon recovery, the patient shall be discharged, Allen failed to prove the Illinois Act was criminal in nature. The Court also held that, although the Illinois Act afforded persons many rights available in criminal proceedings, the provision of these rights did not automatically convert the statute into one that was punitive in nature.

The dissent, written by Justice John Paul Stevens, and joined by Justices William Brennan, Thurgood Marshall, and Harold Blackmun, argued simply that the statute was criminal in nature. Justice Stevens urged that the law required an examination of the entire statute in context, and that such an examination led to the conclusion that the statute was so similar to a criminal statute that it should be labeled criminal as well.

Once the Supreme Court established the civil nature of these statutes, the next step for opponents was to argue that civil commitment was unconstitutional as a matter of due process, which was the heart of the argument in *Kansas v. Hendricks*.

3. *Kansas v. Hendricks*

In 1997, the Supreme Court upheld the constitutionality of the Kansas Act, which provided for the civil commitment of certain sex offenders upon their release from prison. Leroy Hendricks was the first inmate committed under the Kansas Act and appealed on grounds of substantive due process, double jeopardy, and *ex post facto* law-making.

Hendricks’s criminal history of sexually abusing children spanned three decades, beginning in 1955 when he was found guilty of indecent exposure. In 1957, he was convicted of lewdness with a young girl and went to jail for a brief period. In 1960, while working for a
carnival, he molested two young boys. He was paroled after serving just two years of that sentence, only to be re-arrested for molesting a seven-year-old girl. After a brief time in treatment for sexual deviance, he was deemed safe and released into society once again. But, shortly after, he sexually assaulted a young boy and girl. For these crimes he served less than five years and refused to participate in sex offender treatment while incarcerated. Hendricks was paroled in 1972 and abandoned treatment for pedophilia, the disorder with which he was diagnosed. Just after his latest parole, Hendricks began sexually abusing his stepdaughter and stepson, forcing them to engage in sexual activity with him over a period of four years. Finally, in 1984, Hendricks was convicted for taking indecent liberties with two thirteen-year-old boys and served a ten-year sentence in prison. At the end of the last prison sentence, the State of Kansas sought to have Hendricks committed under the Kansas Act. At trial, Hendricks admitted to being unable to control his urges to molest children and informed the court that the only way he could stop was “to die.” After the trial, Hendricks was deemed a sexually violent predator and committed for an indefinite period to a mental institution.

Hendricks claimed that the Kansas Act was violative of substantive due process because it only required a finding of a “mental abnormality” rather than demanding proof of “mental illness.” In response, the Supreme Court held that the term “mental abnormality” sufficed to classify a subclass of persons subject to civil confinement.

85. Id.
86. Id.
87. Id.
88. Id.
89. Hendricks. 521 U.S. at 355. In fact, Hendricks made a point to tell a physician that “treatment is bull—-.” Id.
90. Id. at 354.
91. Id.
92. Id.
93. Id.
94. Hendricks. 521 U.S. at 354. Hendricks was diagnosed with pedophilia (a diagnosis with which he “readily agrees”), personality trait disturbance, and passive-aggressive personality. Id. at 355 n.2.
95. Id. at 356-57.
96. Id.
97. Id. The Court stated:
The liberty secured by the Constitution of the United States to every person within its jurisdiction does not import an absolute right in each person to be, at all times and in all circumstances, wholly free from restraint. There 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.
Court noted that it had historically sustained civil commitment statutes when they “have coupled proof of dangerousness with the proof of some additional factor, such as ‘mental illness’ or ‘mental abnormality.’” These additional requirements served to limit the class of committed persons to a narrow group of dangerous persons. Finally, the Court held:

[t]he Kansas Act is plainly of a kind with these other civil commitment statutes: It requires a finding of 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.

In sum, the Court, unanimously and without qualification, held the Kansas Act comported with substantive due process requirements.

Hendricks also claimed that the Kansas Act was criminal in nature and thus violated the Double Jeopardy and Ex Post Facto Clauses of the United States Constitution. As in Allen, the Court required a party questioning the nature of an explicitly marked civil statute to satisfy a heavy burden in order to persuade the Court to treat the statute as criminal. Hendricks failed to convince a majority of the Court of the merits of this argument. First, the Court held the Kansas Act did not implicate retribution or deterrence, the two primary goals of criminal punishment. No criminal culpability was attached to the civil commitment, so retribution was necessarily excluded as an objective. Further, the Court noted that since those committed persons were suffering from an abnormality or illness, they were prevented from exercising adequate control over themselves and were, therefore, unlikely to be deterred by the civil commitment statute.

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98. Id. at 357.
99. Id. at 357. The Court stated: “States 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.” Id. Note, though, that the Court recalled this historical civil commitment justification, but did not hold that a person must be unable to control his behavior before commitment is warranted. Rather, it upheld the Kansas Act as it was, without qualifying the statutory criteria. This point will be further explored in Part V.

100. Id.
101. Id.
102. Hendricks, 521 U.S. at 350.
103. Id. at 361.
104. Id.
105. Id.
106. Id.
107. Id.
Moreover, those committed were treated in the same manner as other involuntarily committed persons, not as criminals in prison.\textsuperscript{108} The fact that the program may fail to offer adequate treatment to some patients did not convince the Court that it was a punitive law.\textsuperscript{109} The Court noted that while some dangerous persons may not be treatable, that fact alone did not obligate their release into society.\textsuperscript{110} The majority further stated that "[u]nder appropriate circumstances and when accompanied by proper procedures, incapacitation may be a legitimate end of the civil law."\textsuperscript{111} The fact that Kansas's "overriding concern," segregation of sexually violent offenders, was consistent with civil law and bolstered by the State's ancillary goal of providing treatment to offenders when it was possible.\textsuperscript{112} With all of his arguments defeated, Hendricks's civil commitment was reinstated, and the United States Supreme Court reversed the judgment of the Kansas Supreme Court.\textsuperscript{113}

Justice Anthony Kennedy, who noted his full agreement with the majority, entered a short concurrence.\textsuperscript{114} His agreement was based largely on the specific facts of this case.\textsuperscript{115} He offered a cautionary note: "If . . . civil confinement were to become a mechanism for retribution or general deterrence, or if 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."\textsuperscript{116}

A dissent, written by Justice Stephen Breyer, argued as Justice Stevens did in \textit{Allen}, that the statute was punitive in nature and should be recognized as such.\textsuperscript{117} Because of this categorical distinction, Justice

\textsuperscript{108} Hendricks, 521 U.S. at 367-68.
\textsuperscript{109} Id. However, now persons committed under the Act receive approximately thirty-two hours of treatment per week. \textit{Id.} at 368.
\textsuperscript{110} Id. at 355-56.
\textsuperscript{111} Id.
\textsuperscript{112} Id.
\textsuperscript{113} Hendricks, 521 U.S. at 371. Specifically, the Court stated: "We hold that the Kansas Sexually Violent Predator Act comports with due process requirements and neither runs afoul of double jeopardy principles nor constitutes an exercise in impermissible \textit{ex post facto} lawmaking. Accordingly, the judgment of the Kansas Supreme Court is reversed." \textit{Id.}
\textsuperscript{114} Id. at 371 (Kennedy, J., concurring).
\textsuperscript{115} Id. (Kennedy, J., concurring).
\textsuperscript{116} Id. at 373 (Kennedy, J., concurring). Justice Kennedy also noted that incapacitation was a goal common to both the civil and criminal systems of confinement. \textit{Id.} (Kennedy, J., concurring).
\textsuperscript{117} Hendricks, 251 U.S. at 379 (Breyer, J., dissenting). Specifically, Justice Breyer stated: [T]he Act before us involves an affirmative restraint historically regarded as punishment; imposed upon behavior already a crime after a finding of scienter; which restraint, namely, confinement, serves a traditional aim of punishment, does not primarily
Breyer insisted the Court should have invalidated the commitment of Hendricks on *ex post facto* grounds. However, the majority of the Court upheld the statute with no qualifications as constitutionally sound. A popular argument, the Court again revisited the civil versus punitive issue in 2001 in *Seling v. Young*, discussed below. However, before addressing that case, the following section will discuss *In re Crane*, a case decided at the state supreme court level before *Seling* and then by the United States Supreme Court after *Seling*.

4. *In re Crane*

The State of Kansas filed a petition seeking to have Michael T. Crane adjudicated as a sexually violent predator and committed pursuant to the Kansas Act. The State was successful and Crane appealed from his commitment, arguing that it was unconstitutional because the State did not prove that he was unable to control his behavior. The Kansas Supreme Court agreed and reversed Crane's commitment, declaring that the United States Supreme Court read a volitional impairment requirement into the Kansas Act when it decided *Kansas v. Hendricks* in 1997. The State of Kansas petitioned the United States Supreme Court for certiorari, which was granted. The Supreme Court, for the second time in five years, considered the constitutionality of the same state law it upheld in *Kansas v. Hendricks*. This section discusses both court decisions regarding Crane.

a. Kansas Changed the Requirements in *In re Crane*

Crane was convicted of lewd and lascivious behavior for exposing himself to a tanning salon attendant in 1993. Crane also pleaded guilty to aggravated sexual battery, related to an incident that occurred after Crane left the tanning salon. He entered a video store, waited until he was alone in the store with the clerk, and then grabbed her from behind. With himself exposed, he lifted and pushed her...
and squeezed her neck while ordering her three times to perform oral sex and telling her he was going to rape her. Then, suddenly, Crane stopped and fled the store, ending the attack.

At the commitment trial, two psychologists and a psychiatrist testified to the results of their evaluations of Crane. One psychologist, Douglas Hippe, concluded that Crane suffered from antisocial personality disorder, consistently exhibiting six out of seven criteria listed in the Diagnostic and Statistical Manual of Mental Disorders (DSM-IV). Further, Hippe found that Crane suffered from exhibitionism. He expressed the opinion that Crane was a sexual predator due to both disorders. Hippe also noted that Crane’s criminal incidents had increased in frequency and intensity, his actions became more daring and aggressive, and his disregard for the rights of others increased as well. Psychologist Robert Huerter testified that there was no merit to Crane’s claim that he had been in a blackout state during the attack. Finally, psychiatrist Leonardo Mabugat testified to Crane’s antisocial personality disorder, noting that he displayed “a pervasive pattern of disregard for and violation of the rights of

126. In re Crane, 7 P.3d at 286.
127. Id.
128. Id.
129. Id. at 287. The Diagnostic and Statistical Manual of Mental Disorders offers the following criteria for antisocial personality disorder:

A. There is a pervasive pattern of disregard for and violation of the rights of others occurring since age 15 years, as indicated by three (or more) of the following: (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 the safety of self or others; (6) consistent irresponsibility, as indicated by repeated failure to sustain consistent work behavior or honor financial obligations; (7) lack of remorse, as indicated by being indifferent to or rationalizing having hurt, mistreated, or stolen from another.

AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS § 301.7 (1994) [hereinafter DSM-IV]. Items B through D are irrelevant to this discussion.

130. In re Crane, 7 P.3d at 287. Exhibitionism is defined as “[o]ver a period of at least six months, recurrent, intense sexually arousing fantasies, sexual urges, or behaviors involving the exposure of one’s genitals to an unsuspecting stranger. The person has acted on these sexual urges, or the sexual urges or fantasies cause marked distress or interpersonal difficulty.” DSM-IV, supra note 129, § 302.4.

131. In re Crane, 7 P.3d at 287.
132. Id.
133. Id.
Dr. Mabugat also stated that Crane's behavior was a combination of both willful and uncontrollable behavior.

The lower court held that the State must prove "the existence of a mental disorder that makes [Crane] likely to reoffend." On appeal, however, the Kansas Supreme Court pointed to several sentences from the Hendricks opinion, which allegedly supported the inclusion of a requirement that an individual be completely unable to control himself. Therefore, the Kansas Supreme Court held that, despite evidence that Crane suffered from a volitional impairment, his commitment was unconstitutional absent a specific finding that Crane was unable to control his behavior.

b. The United States Supreme Court Vacated the Kansas Decision

In a 7-2 decision announced on January 22, 2002, the United States Supreme Court vacated the Kansas Supreme Court's reversal of Crane's commitment under the Kansas Act. The Court held that Hendricks did not require total or complete lack of control, but that the Constitution did not permit commitment of the type of dangerous sexual offender considered in Hendricks without any lack-of-control determination. The Court instead said "[i]t is enough to say that there must be proof of serious difficulty in controlling behavior." Recognizing the lack of a bright-line rule in this area of law, the Court stressed that the "safeguards of human liberty in the area of mental

134. Id. Dr. Mabugat testified that Crane's behavior included the following: failure to conform to social norms with respect to lawful behaviors as indicated by repeatedly performing acts that were grounds for arrest; impulsivity or failure to plan ahead; irritability; and aggressiveness, as indicated by repeated physical fights or assaults. Id. at 290.

135. Id. at 287.

136. In re Crane, 7 P.3d at 288. Note that this standard corresponds to the Kansas statute, which provides treatment for "sexually violent predators who have a mental abnormality or personality disorder and who are likely to engage in repeat acts of sexual violence if not treated" Kan. Stat. Ann. § 59-29a01 (emphasis added).

137. In re Crane, 7 P.3d at 288. Specifically, the Kansas Supreme Court cited the United States Supreme Court's statement: "These added statutory requirements serve to limit involuntary civil confinement to those who suffer from a volitional impairment rendering them dangerous beyond their control." Id. (quoting Kan. Stat. Ann. § 59-29a02(b)) (emphasis in original). Further, the Kansas Supreme Court noted the statement, "[i]t 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." Id.

138. Id. at 290.


140. Id.

141. Id. at 413.
illness and the law” are not always best served by black and white rules.142

Kansas raised the question of how imposing such a control requirement would impact the part of the statute allowing individuals with emotional impairments to be committed.143 Kansas noted that the state supreme court’s reading of Hendricks would absolutely forbid the commitment of an individual with a mental abnormality affecting emotional capacity while volitional capacity remains intact.144 The Court acknowledged that the opinion in Hendricks was limited to a discussion of volitional impairment, as the facts of that case necessitated.145 At that point, however, the Court specifically declined to answer the question whether commitment based on emotional impairment alone would be constitutional.146 The Court seemed to believe that this question was not very important, stating “our cases suggest that civil commitment of dangerous sexual offenders will normally involve individuals who find it particularly difficult to control their behavior.”147 However, the Court did note that it usually did not distinguish between volitional, emotional and cognitive impairments for constitutional purposes within the context of civil commitment.148

The dissent, authored by Justice Antonin Scalia, and joined by Justice Clarence Thomas, argued for a reversal of the Kansas Supreme Court decision.149 Justice Scalia noted the Court’s departure from its own precedent in Hendricks by stating:

142. Id. at 414.
143. Id.
144. Id.
145. Crane. 534 U.S. at 414. The Court explained:
   We agree that Hendricks limited its discussion to volitional disabilities. And that fact is not surprising. The case involved an individual suffering from pedophilia—a mental abnormality that critically involves what a lay person might describe as a lack of control. Hendricks himself stated that he could not “control the urge” to molest children. In addition, our cases suggest that civil commitment of dangerous sexual offenders will normally involve individuals who find it particularly difficult to control their behavior—in the general sense described above.

146. Id. at 415.
147. Id. at 414.
148. Id. at 415. The Court stated:
   Regardless, Hendricks must be read in context. The Court did not draw a clear distinction between the purely “emotional” sexually related mental abnormality and the “volitional.” Here, as in other areas of psychiatry, there may be “considerable overlap between a . . . defective understanding or appreciation and . . . [an] ability to control . . . behavior.”

149. Crane. 534 U.S. at 415. No member of the Court voted to affirm the Kansas Supreme Court’s decision.
Today the Court holds that the Kansas Sexually Violent Predator Act (SVPA) cannot, consistent with so-called substantive due process, be applied as written. It does so even though, less than five years ago, we upheld the very same statute against the very same contention in an appeal by the very same petitioner (the State of Kansas) from the judgment of the very same court.\(^\text{150}\)

Justice Scalia asserted that the requirements of the Kansas Act ensured that only individuals with mental abnormalities that impaired their control would be committed.\(^\text{151}\) Thus, the extra requirement added by the majority for a finding of inability to control behavior was unnecessary.\(^\text{152}\) Justice Scalia also took issue with the Court's reopening of a question "closed by Hendricks: whether the [Kansas Act] also cannot be applied as written because it allows for the commitment of people who have mental illnesses other than volitional impairments."\(^\text{153}\) He observed that distinguishing between various types of impairments in the civil commitment setting lacked common sense.\(^\text{154}\) He noted that "[i]t is obvious that a person may be able to exercise volition and yet be unfit to turn loose upon society. The man who has a will of steel, but who delusionally believes that every woman he meets is inviting crude sexual advances, is surely a dangerous sexual predator."\(^\text{155}\)

Moreover, Justice Scalia expressed concern over the vague test for constitutionality advanced by the majority.\(^\text{156}\) He argued that trial courts would have "not a clue" about how to determine if an individual possesses the requisite lack of control over himself to qualify for commitment.\(^\text{157}\) Finally, the dissent asserted that the majority opinion degraded the authority of the Court by revoking a decision made less than five years earlier.\(^\text{158}\) Justice Scalia stated that "[t]here is an obvi-

\(^150\) Id. (Scalia, J., dissenting).
\(^151\) Id. at 419-20 (Scalia, J., dissenting).
\(^152\) Id. (Scalia, J., dissenting). Justice Scalia stated: "[T]he SVPA's required finding of a causal connection between the likelihood of repeat acts of sexual violence and the existence of a 'mental abnormality' or 'personality disorder' necessity establishes 'difficulty if not impossibility' in controlling behavior." Id. at 419 (Scalia, J., dissenting) (emphasis in original).
\(^153\) Id. at 421 (Scalia, J., dissenting).
\(^154\) Crane, 534 U.S. at 422 (Scalia, J., dissenting).
\(^155\) Id. (Scalia, J., dissenting).
\(^156\) Id. at 422-23 (Scalia, J., dissenting).
\(^157\) Id. at 423 (Scalia, J., dissenting).
\(^158\) Id. at 424 (Scalia, J., dissenting). Justice Scalia asserted:

The Kansas Supreme Court still did not like the law and prevented its operation, on substantive due process grounds, once again. The State of Kansas again sought certiorari, asking nothing more than reaffirmation of our 5-year-old opinion—only to be told that we said then we now unsay.

Id. (Scalia, J., dissenting).
ous lesson here for state supreme courts that do not agree with our jurisprudence: ignoring it is worth a try."\(^{159}\)

5. Seling v. Young

After the Kansas Supreme Court decided *In re Crane*, but before the United States Supreme Court issued an opinion in *Crane, Seling v. Young* was decided by the United States Supreme Court.

The Supreme Court upheld Washington State's Community Protection Act (Washington Act), a civil commitment statute for sexual predators.\(^{160}\) Andre Brigham Young appealed from a unanimous jury determination that he was a sexually violent predator, subject to confinement under the Washington Act.\(^{161}\) Young argued that the Washington Act was unconstitutional because it was punitive in application to him.\(^{162}\)

Young was convicted of six rapes over three decades.\(^{163}\) It was upon his latest release from incarceration that the State of Washington sought to have him committed as a sexually violent predator.\(^{164}\) An expert testified that Young suffered from a severe personality disorder with primarily paranoid and antisocial features.\(^{165}\) Young was also diagnosed with severe paraphilia,\(^{166}\) classified as either...

\(^{159}\) *Crane*, 534 U.S. at 424 (Scalia, J., dissenting).

\(^{160}\) *Seling*, 531 U.S. at 253.

\(^{161}\) *Id.*

\(^{162}\) *Id.* at 253-54.

\(^{163}\) *Id.* at 255.

\(^{164}\) *Id.*

\(^{165}\) *Id.*

\(^{166}\) A paraphilia is a condition whereby a person's ability to become sexually aroused and/or gratified is dependent upon either fantasizing about or performing certain atypical or extreme sexual behavior. The Sinclair Intimacy Institute Website, at http://www.intimacyinstitute.com/sex_data/topics/paraphilia.html (last visited Feb. 18, 2003) (on file with DePaul Law Review). Paraphilias are much more prevalent among men than women, and the focus of such paraphilias is usually constant and specific. *Id.* Examples of paraphilias include: fetishism (fixation on an object or body part that is not considered sexual in nature); transvestism (males' need to dress in women's clothing in order to become aroused); voyeurism (becoming sexually aroused by watching people undress or engaged in sexual activity, without their knowledge or consent); exhibitionism (compulsively exposing one's genitals to unsuspecting victims in order to shock or frighten them); sadism (deriving sexual gratification from inflicting pain on one's partner); masochism (deriving sexual gratification from being subjected to pain); pedophilia (fixation on fantasy or engagement in sexual acts with children); and bestiality (engaging in sexual activity with animals). *Id.* See also DSM-IV, supra note 129, at 522. Definition of paraphilia is as follows: recurrent, intense sexually arousing fantasies, sexual urges, or behaviors generally involving 1) non-human objects, 2) the suffering or humiliation of oneself or one's partner, or 3) children or other non-consenting persons, that occur over a period of at least 6 months. The behavior, sexual urges, or fantasies cause clinically significant distress or impairment in social, occupational, or other important areas of functioning.
paraphilia sexual sadism\textsuperscript{167} or paraphilia not otherwise specified (rape).\textsuperscript{168}

The Washington Supreme Court concluded that the Washington Act was "concerned with treating committed persons for a current mental abnormality, and protecting society from the sexually violent acts associated with that abnormality, rather than being concerned with criminal culpability."\textsuperscript{169} The United States Supreme Court agreed with this finding and, as it did in \textit{Allen} and \textit{Hendricks}, found the Washington Act civil on its face.\textsuperscript{170} Because the Washington Act was determined to be facially civil, Young’s "as applied" challenge had to fail.\textsuperscript{171} To allow such challenges when the statute was civil, concluded the Court, would prove "unworkable."\textsuperscript{172} "The civil nature of a confinement scheme cannot be altered based merely on vagaries in the implementation of the authorizing statute."\textsuperscript{173} The Court reserved the question of whether specific circumstances might be considered in the primary inquiry into the nature of such a statute.\textsuperscript{174}

Concurring opinions by Justices Scalia and Thomas primarily focused on answering the question that the majority reserved.\textsuperscript{175} Both concurrences concluded that there was no difference between a primary inquiry and subsequent ones for purposes of as applied challenges to a statute.\textsuperscript{176} Justice Scalia stated, "We repeated, to be sure, the principle that the statutory scheme would be criminal if it was suf-

\textsuperscript{167} Where, over a period of at least six months, a person experiences "recurrent, intense sexually arousing fantasies, sexual urges, or behaviors involving acts (real, not simulated) in which the psychological or physical suffering (including humiliation) of the victim is sexually exciting to the person." DSM-IV, \textit{supra} note 129. § 302.84. The definition also includes the requirement that the "person has acted on these sexual urges with a non-consenting person, or the sexual urges or fantasies cause marked distress or interpersonal difficulty." \textit{Id.} (emphasis added).

\textsuperscript{168} \textit{Seling}, 531 U.S. at 256. "The State's expert concluded that Young's condition, in combination with the personality disorder, the span of time during which Young committed his crimes, his recidivism, his persistent denial, and his lack of empathy or remorse, made it more likely than not that he would commit further sexually violent acts." \textit{Id.}

\textsuperscript{169} \textit{Id.} at 257.

\textsuperscript{170} \textit{Id.} at 260-61.

\textsuperscript{171} \textit{Id.} at 263.

\textsuperscript{172} \textit{Id.} In his concurrence, Justice Thomas stated that not only are as-applied challenges "unworkable," they are prohibited by \textit{Hudson v. United States}. \textit{Seling}, 531 U.S. at 272 (Thomas, J., concurring) (citing \textit{Hudson v. United States}, 522 U.S. 93 (1997)).

\textsuperscript{173} \textit{Id.} at 263.

\textsuperscript{174} \textit{Id.} at 265-66.

\textsuperscript{175} \textit{Id.} at 267-74 (Scalia & Thomas, J.J., concurring).

\textsuperscript{176} \textit{Id.} Justice Scalia noted that "harsh executive implementation cannot ‘transform’ what was clearly intended as a civil remedy into a criminal penalty, any more than compassionate executive implementation can transform a criminal penalty into a civil remedy." \textit{Id.} at 269 (Scalia, J., concurring). Justice Scalia further noted the Court’s "sound and traditional reluctance to be the initial interpreter of state law." \textit{Seling}, 531 U.S. at 270 (Scalia, J., concurring).
ficiently punitive 'either in purpose or effect,' but it was clear from the opinion [Hudson v. United States] that this referred to effects apparent upon the face of the statute."' 177

The sole dissenter, Justice Stevens, urged that Young should have been allowed to prove that the statute was criminal in nature as applied to him and thus agreed with the Ninth Circuit's holding.178 Despite this dissent, Young's constitutional challenge to the law failed, and his commitment under the Washington Act was reinstated.179 The Ninth Circuit's judgment was reversed.180

III. ANALYSIS OF JUDICIAL TREATMENT AND POPULAR ARGUMENTS

The analysis in this section focuses primarily on four cases: Kansas v. Hendricks, In re Crane, as decided by the Kansas Supreme Court, Seling v. Young, and Kansas v. Crane, the most recent United States Supreme Court decision on the subject of civil commitment for sexual predators. This Comment asserts that Hendricks was properly decided, In re Crane was improperly decided in light of Hendricks and Young, and the United States Supreme Court failed to follow its own precedent when deciding Kansas v. Crane. This section also explores common arguments against civil commitment for sexual predators and why they fail to be persuasive.

A. Kansas v. Hendricks was Properly Decided

In Hendricks, the Supreme Court faced several constitutional arguments, and properly rejected each of them. This section discusses why the Court was correct in its ruling on substantive due process and explains why it was logical, rather than determinative, that the Court addressed Hendricks in terms of volitional control specifically. Finally, this section addresses the public policy interests upheld by the Court's decision.
1. Civil Commitment Statutes for Sexual Predators Do Not Violate Due Process

The Supreme Court held in Hendricks that the Kansas Act did not violate substantive due process.\textsuperscript{181} "Substantive" due process is the constitutional requirement that legislation must be fair and reasonable in content and that it must further a legitimate government interest.\textsuperscript{182} Here, according to the Court, Kansas's use of the term "mental abnormality" easily satisfied substantive due process as fair and reasonable in content.\textsuperscript{183} The use of this term allows the legislature and the medical community necessary flexibility in identifying and treating sex offenders with a myriad of mental problems, many of them not readily diagnosable as illnesses or diseases. Such mental problems, although not fitting neatly into ready-made medical pigeonholes, cause the patient to experience severe social and personal distress,\textsuperscript{184} as evidenced by repeated criminal behavior. This distress may manifest in several ways, including, as the Kansas Act recognizes, emotional impairment of the individual.\textsuperscript{185}

Critics argue that these sex offenders should not be committed because they could not be committed under general civil commitment laws and, thus, the new laws are violative of substantive due process.\textsuperscript{186} This argument fails to acknowledge that states have authority to devise more than one commitment law to treat more than one category of ill individual.\textsuperscript{187} In fact, it was necessary for states to design these sexual predator laws to handle a growing problem in society that was not adequately addressed by then-existing legislation.\textsuperscript{188} Under current sexual predator laws, persons with mental abnormalities pose the requisite danger to society and possess a need for treatment such

\begin{itemize}
  \item \textsuperscript{181} Hendricks, 521 U.S. at 346.
  \item \textsuperscript{182} BLACK'S LAW DICTIONARY 517 (7th ed. 1999).
  \item \textsuperscript{183} Hendricks, 521 U.S. at 346. The Court stated that "Hendricks' diagnosis as a pedophile, which qualifies as a 'mental abnormality' under the Act, thus plainly suffices for due process purposes." \textit{Id.} at 360 (emphasis added).
  \item \textsuperscript{184} See supra note 166 (defining paraphilia, per DSM-IV).
  \item \textsuperscript{185} The definition of "mental abnormality" in the Kansas Sexually Violent Predator Act reads: "congenital or acquired condition affecting emotional or volitional capacity which predisposes the person to commit sexually violent offenses." \textit{Kan. Stat. Ann.} § 59-29a02(b).
  \item \textsuperscript{186} This was argued by the defendant in \textit{Kansas v. Hendricks}, who claimed civil commitment required a specific finding of mental illness, ignoring the distinction between general civil commitment laws and sexual predator commitment laws. \textit{Hendricks}, 521 U.S. at 361-62.
  \item \textsuperscript{187} \textit{Id.} at 359. "[W]e have never required state legislatures to adopt any particular nomenclature in drafting civil commitment statutes. Rather, we have traditionally left to legislators the task of defining terms of a medical nature that have legal significance." \textit{Id.}
  \item \textsuperscript{188} Legislation prior to the sexual predator commitment laws consisted only of general commitment laws, which required a finding of mental illness as a predicate for confinement and treatment. \textit{See Kan. Stat. Ann.} § 59-29a01.
\end{itemize}
that commitment would be proper. The Court in *Hendricks* properly dismissed the argument the petitioner tried to assert.\(^{189}\) No due process consideration was offended by the addition of another, more specialized, commitment statute.\(^{190}\)

Having established the governmental interests of protecting its citizens and treating the ill, the Kansas Act was deemed fair and reasonable in content, and thus not violative of substantive due process.\(^{191}\) This decision by the Supreme Court was a necessary step in allowing states to protect their citizens from new dangers, namely sexually violent predators.

2. *The Court's Opinion in Kansas v. Hendricks was Necessarily Replete with References to Volitional Control*

The specific facts of *Hendricks* lent themselves to the Court's repetitive language concerning volitional control. Several statements throughout the opinion made reference to Hendricks's admitted lack of control over his behavior.\(^{192}\) This is to be expected where a defendant testified before the court that he would not stop molesting children until he dies.\(^{193}\) Such clear and unequivocal admission of lack of control makes a commitment decision easier than when a defendant professes, even if falsely, remorse and a promise never to do it again. Here, Hendricks gave the district court a clear reason to commit him, as he even agreed with the diagnosing physician that he was a

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189. The Court stated that "mental abnormality" is equally sufficient, for substantive due process purposes, as "mental illness." See *supra* notes 80-119 and accompanying text (discussing *Hendricks*).
190. *Hendricks*, 521 U.S. at 357.
191. *Id.* at 350.
192. Such statements by Justice Thomas included: "States 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." *Id.* at 357. "These added statutory requirements serve to limit involuntary civil confinement to those who suffer from a volitional impairment rendering them dangerous beyond their control." *Id.* at 358.
193. 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.
194. *Id.* "[I]t narrows the class of persons eligible for confinement to those who are unable to control their dangerousness." *Id.* "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." *Hendricks*, 521 U.S. at 360. "Those persons committed under the Act are, by definition, suffering from a 'mental abnormality' or a 'personality disorder' that prevents them from exercising adequate control over their behavior." *Id.* at 362.
195. *Id.* at 355. "He stated that the only sure way he could keep from sexually abusing children in the future was 'to die.'" *Id.*
pedophile. Such facts contributed largely to the Supreme Court’s language, but despite all the references to volitional control, the holding of the case merely upheld the Kansas Act and noted that the criteria contained therein would make it clear that a defendant would have difficulty controlling his behavior. That is, in order to satisfy the remainder of the statute, some impairment had to be present, though the Court did not specify that the impairment must be volitional. Under the statute, and therefore presumably under the Court’s holding, an emotional impairment would suffice. The Court’s volitional language should not be read to require the presence of volitional impairment as a predicate, as the Court should have been explicit in the holding if it intended such a requirement be added.

3. The Supreme Court Reaffirmed Sound Policy by Upholding the Kansas Act

The Hendricks decision was based on sound policy considerations that have been long recognized by the Supreme Court. Civil commitment has historically been approved as proper for a specific group of persons in order to protect society from them, and them from themselves. The Court affords the Kansas legislature and other state legislatures the latitude they need when dealing with modern problems. This latitude is granted in spite of, in fact, because of, disagreement within the medical community. When society wants to enact a law, but medicine and science do not offer certainty as to the course, the legislature is granted broad power. This is a necessary policy of the Court, given the lack of uniformity in the area of psychology.

Moreover, the Court gave the protection of society due weight in this decision. Often, the rights of the offender take precedence over

194. Id. “Hendricks readily agreed with the state physician’s diagnosis that he suffers from pedophilia and that he is not cured of the condition.” Id.

195. Specifically, the Court stated: “We hold that the Kansas Sexually Violent Predator Act comports with due process requirements and neither runs afoul of double jeopardy principles nor constitutes an exercise in impermissible ex post facto lawmaking.” Hendricks, 521 U.S. at 371. During oral arguments in Kansas v. Crane, the Court noted that it also held the following: “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.” Id. at 358.

196. See id. at 357; Addington, 441 U.S. at 426-27; Foucha v. Louisiana, 504 U.S. 71, 80 (1992).

197. See Jones, 463 U.S. at 365.

198. “[R]egarding congressional enactments, when a legislature ‘undertakes to act in areas fraught with medical and scientific uncertainties, legislative options must be especially broad and courts should be cautious not to rewrite legislation.”’ Hendricks, 521 U.S. at 360 n.3 (citing Jones, 463 U.S. at 370) (internal quotation marks and citation omitted).
the rights of society, and this opinion offered a proper balance. The State has a heavy burden to prove—beyond a reasonable doubt in the minds of twelve jurors or a judge—that a sex offender is in fact a sexual predator in need of treatment and confinement.\footnote{199} Once this is proven, however, society is protected from mentally deficient offenders until such time as the person is no longer a danger to others.\footnote{200} This is especially important for protecting children, which has historically been deemed a compelling interest by the Supreme Court.\footnote{201}

Finally, the Court allowed states to compel an ill person to undergo treatment where it was necessary.\footnote{202} Although not always successful, studies have shown drastically decreased recidivism rates for sex offenders who have received treatment.\footnote{203} However, when sex offenders are offered treatment during incarceration, it is very often refused for a number of reasons.\footnote{204} The Kansas Act provides for treatment that may benefit the individual, when he otherwise would not accept it. This protects society as well as the treated individual, as repeated incarceration, not surprisingly, has been shown to have negative effects on inmates.\footnote{205}

B. In re Crane was Wrongly Decided by the Kansas Supreme Court and Only Partially Redeemed by the United States Supreme Court

The Kansas Supreme Court improperly read a requirement of complete lack of control into the Hendricks decision. Although the United States Supreme Court, in Kansas v. Crane, acknowledged this error, it added a lack of control requirement that was seemingly absent in Hendricks and never even mentioned in Seling v. Young. While the general statute was upheld, the Court amended its earlier decision in a break from precedent. This section discusses why the

\footnote{199} See Hendricks, 521 U.S. at 357-59.
\footnote{201} See Isaac, supra note 15, at 1314-15. Isaac discusses the Supreme Court’s opinion in New York v. Ferber, 458 U.S. 747 (1982). where the Court stated: A democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens. Accordingly, we have sustained legislation aimed at protecting the physical and emotional well-being of youth even when the laws have operated in the sensitive area of constitutionally protected rights. Id. at 757 (internal citations omitted).
\footnote{204} See Daley, supra note 14, at 720 (noting that sex offenders often refuse treatment in prison because they do not wish other inmates to know about their crimes. as rapists and child molesters are hated by other inmates).
\footnote{205} See generally Dorsett, supra note 14.
Kansas Supreme Court’s analysis was flawed and why the United States Supreme Court, albeit to a lesser degree, was also incorrect in its analysis of prior case law.

1. The Supreme Court Did Not Explicitly Add a Volitional Impairment Requirement to the Kansas Act in Its Holding in Kansas v. Hendricks

The explicit holding of Kansas v. Hendricks was “that the Kansas Sexually Violent Predator Act comports with due process requirements and neither runs afoul of double jeopardy principles nor constitutes an exercise in impermissible ex post facto lawmaking.”206 Nowhere in that holding did the Court add another constitutional requirement to the Kansas Act. When the Supreme Court heard oral arguments on this case on October 30, 2001, Justice Scalia stated the holding as including the following statement:

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.207

Even given this version of the holding, there is no language to support a separate requirement of volitional control specifically. In fact, Justice Scalia, in his dissent in Kansas v. Crane, explained that the above holding recognized that some lack of control was inherently present in individuals who qualified under the Kansas Act.208 Thus, no separate finding should have been required. The fact that the Kansas Supreme Court required one demonstrates a lack of understanding of Hendricks and an improper reading of the Kansas Act. The United States Supreme Court now requires a separate finding of some lack of control, which is confusing given its own precedent in Hendricks and Young.

2. Kansas v. Crane Conflicts with Seling v. Young

The decision in Young, coming down after In re Crane and before the Supreme Court heard arguments on Kansas v. Crane, offers clarification for many of the arguments the Kansas court endorsed in In re Crane. The Kansas court focused primarily on the Supreme Court’s

208. See supra notes 150-159 and accompanying text.
references to volitional control when it decided *Hendricks.*\(^{209}\) Notably, the *Young* decision made absolutely no reference to volitional control, or lack thereof, as being a requirement for a statute to be constitutional on its face.\(^{210}\) In fact, Justice O'Connor, writing for the majority, recited the definition of a sexual predator under the Washington Act, and the jury's findings at Young's trial.\(^{211}\) Both statements are completely void of any language regarding volitional control. Yet never does the majority, the concurrences, or the dissenting opinion even mention the "added requirement" that was supposedly asserted in *Hendricks.* One would think that if the Supreme Court had altered the Kansas Act to require an additional finding, it would certainly have altered the Washington Act similarly, as the two are practically identical in wording. It reasonably follows that failure to indicate the additional requirement means there is no such additional constitutional requirement at all. Although the Washington Act came before the Court under a presumption that it was facially civil,\(^{212}\) surely the Court would have pointed out that the omission of the new requirement makes the statute patently unconstitutional on its face if that were the case. The Court even compared the Washington Act with the Kansas Act explored in *Hendricks,* calling the two "strikingly similar."\(^{213}\) Nor was the point of volitional control moot, because the lower court did not make a specific finding that Young was unable to control his behavior.\(^{214}\)

The United States Supreme Court's decision in *Kansas v. Crane* is puzzling given this recent case. Fortunately, however, the Supreme Court did not endorse the Kansas court's complete lack of control standard. Rather, the majority agreed with Kansas that such a stan-

\(^{209}\) See generally *In re Crane.* 7 P.3d 285.

\(^{210}\) See *Selbing,* 531 U.S. 250.

\(^{211}\) *Id.* at 254.

The Act defines a sexually violent predator as someone who has been convicted of, or charged with, a crime of sexual violence and who suffers from a mental abnormality or personality disorder that makes the person more likely to engage in predatory acts of sexual violence if not confined in a secure facility.

*Id.*

In the state expert's opinion, severe paraphilia constituted a mental abnormality under the Act. The State's expert concluded that Young's condition, in combination with the personality disorder, the span of time during which Young committed his crimes, his recidivism, his persistent denial, and his lack of empathy and remorse, made it more likely than not that he would commit further sexually violent acts.

*Id.* at 256.

\(^{212}\) *Id.* at 260-61. "As the Washington Supreme Court held and the Ninth Circuit acknowledged, we proceed on the understanding that the Washington Act is civil in nature." *Id.*

\(^{213}\) *Selbing,* 531 U.S. at 260.

\(^{214}\) *Id.*
standard was unworkable and unnecessary. This new standard, however, may present application problems. Just how little control must a person have over himself before he may be committed under the Kansas Act?

3. **How Much and What Type of an Impairment Should Be Required? The United States Supreme Court Gives No Clear Answer**

The United States Supreme Court seems to have made *any* type of impairment of ability to control behavior and decisions—not merely physical inability to control—grounds for commitment. This is the most logical and workable standard, because differentiating between types of impairment could create problems in the application of the statute. Because such a standard has been adopted, there really is no need for an additional factual finding of such impairment, as impairment of some type is required by the DSM-IV in order to diagnose a disorder or abnormality in the first place. Therefore, the Supreme Court’s requirement of a separate finding seems redundant, but is hopefully harmless from a practical standpoint.

The potentially larger problems arise when courts must decide just how much control over oneself is enough to escape commitment. Not only is the type of impairment needed unclear, but the extent of the impairment is also vague. Justice Scalia, in his dissent, highlighted the subjectivity of the majority’s chosen standard. He questioned whether a percentage value, frequency ratio, or merely an adverb should be attached when charging a jury with what they must find in order to commit.

215. *See Oral Argument, supra* note 207, at *6-31. Ms. Stovall made several references to this requirement being “part and parcel” to a psychiatric diagnosis and, therefore, there was no need for a separate finding of something inherent in an initial diagnosis. *Id.*


217. *Id.* “How is one to frame for a jury the degree of ‘inability to control’ which, in the particular case, ‘the nature of the psychiatric diagnosis, and the severity of the mental abnormality’ require?” *Id.* (emphasis in original).

Will it be a percentage (“Ladies and gentleman of the jury, you may commit Mr. Crane under the SVPA only if you find, beyond a reasonable doubt, that he is 42% unable to control his penchant for sexual violence”)? Or a frequency ratio (“Ladies and gentlemen of the jury, you may commit Mr. Crane under the SVPA only if you find, beyond a reasonable doubt, that he is unable to control his penchant for sexual violence 3 times out of 10”)? Or merely an adverb (“Ladies and gentlemen of the jury, you may commit Mr. Crane under the SVPA only if you find, beyond a reasonable doubt, that he is appreciably—or moderately, or substantially, or almost totally—unable to control his penchant for sexual violence”)? None of these seems to me satisfactory.
It should be recognized that a disorder that impairs the ability to make a decision, because it severely distorts the person's view of the situation, is just as dangerous as a disorder that compels a person's behavior. Although the Supreme Court declined to rule on whether an emotional impairment would suffice under constitutional standards, presumably it would if the state could show it affected behavior and/or decision-making abilities to the extent required. After all, the Court noted in its opinion that it has historically declined to distinguish between certain types of impairments and, as Justice Scalia noted, doing so would not make sense.

In sum, the Kansas legislature included both emotional and volitional impairments in order to cover the range of disordered individuals who are both dangerous to society and sexually violent. The Kansas Supreme Court did not have the authority to overrule the United States Supreme Court's earlier unqualified endorsement of the Kansas legislature's enactment of the Kansas Act. It may not couch its disfavor of commitment legislation for sexual offenders in constitutional language and expect that language to legitimize its own personal objections to a law properly enacted by the state government. On the other hand, the United States Supreme Court does have the authority to overrule its earlier unqualified endorsement of the Kansas Act, and it seems to have done so here.

Having explored the judicial opinions on the subject, the following section of this Comment will address several arguments often embraced by scholars in opposition to civil commitment of sexual predators.

C. Common Arguments Opposing Civil Commitment of Sexual Predators

Scholars and commentators have advanced several arguments as to why civil commitment of sexual predators is unconstitutional. The most common arguments include the following: (1) the "slippery slope" argument; (2) these laws are examples of "reactionary legislation;" (3) the statutes are truly punitive in nature because treatment is delayed until the end of a prisoner’s incarceration; (4) civil commitment of sexual predators equals a life sentence for them; and (5) civil commitment statutes do not address the majority of offenders, who are never apprehended and convicted. This section discusses these arguments and why they fail to be persuasive.
1. The “Slippery Slope” Argument is Inadequate to Challenge Sexual Predator Commitment Laws

An argument often advanced by critics of sexual predator commitment laws is the familiar “slippery slope”: If we allow commitment of sexual predators, what will follow, commitment of robbers and drunk drivers? All criminals have relatively high recidivism rates, and many have antisocial personality traits, so the argument goes. However, this argument is flawed in four significant ways.

First, sexual predators as a class are distinguishable from general criminals. Their recidivism rates are dramatically higher than are those of other types of crimes. They are driven to criminality by serious mental conditions, often stemming from their own childhood abuse. They are not motivated by monetary need, as are many who rob. Even the Federal Rules of Evidence recognize sexual offenses as different from other violent crimes. As one commentator explained, “[w]here rape is involved, the rules of the game are simply different.” Specifically, Rules 413-415 allow for admission of evidence in sex offense cases, both criminal and civil, that would otherwise not be admissible. The rules themselves, and the congressional discussion of them, clearly indicate the legislature’s recognition of sex crimes as a category in need of and deserving special considerations.

218. See Daley, supra note 14, at 731-32; Dorsett, supra note 14, at 144 (suggesting that drug addicts who commit robberies to obtain money or alcoholics may be committed under the Kansas statute).

219. See Dorsett, supra note 14.


221. See Fed. R. Evid. 412-415. For agreement with this argument, as well as further elaboration, see Isaac, supra note 15, at 1314-15.

222. Vivian Berger, Man’s Trial, Woman’s Tribulation: Rape Cases in the Courtroom, 77 Colum. L. Rev. 1, 10 (1977).

223. Federal Rule of Evidence 413 provides, in part: “In a criminal case in which the defendant is accused of an offense of sexual assault, evidence of the defendant’s commission of another offense or offenses of sexual assault is admissible, and may be considered for its bearing on any matter to which it is relevant.” Fed. R. Evid. 413. Federal Rule of Evidence 414 provides, in part: “In a criminal case in which the defendant is accused of an offense of child molestation, evidence of the defendant’s commission of another offense or offenses of child molestation is admissible, and may be considered for its bearing on any matter to which it is relevant.” Fed. R. Evid. 414. Federal Rule of Evidence 415 provides for admission of evidence of prior acts in civil trials. Fed. R. Evid. 415.

224. 140 Cong. Rec. H8991-H8992 (daily ed. Aug. 21, 1994) (statement of Rep. Molinari): The enactment of this reform is first and foremost a triumph for the public—for the women who will not be raped and the children who will not be molested because we have strengthened the legal system’s tools for bringing the perpetrators of these atro-
Moreover, the harm inflicted by these offenders is primarily aimed at children, who are in special need of protection.\textsuperscript{225} Aside from murder, sexual abuse is possibly the most traumatic and horrible crime a victim could endure, with effects that last a lifetime. The harm is so great in these crimes, especially when the victim is a child, that these laws are necessary to protect the public from a different kind of criminal and a different kind of harm.

Second, although the concern over defining the proper candidates for involuntary commitment is extremely valid, there are statutory and procedural safeguards in place. For example, although many inmates may have antisocial personality traits, far fewer have antisocial personality disorders provable beyond a reasonable doubt.\textsuperscript{226} Some studies estimate seventy-five percent of incarcerated individuals exhibit antisocial personality traits.\textsuperscript{227} However, of these that are violent sex offenders in the first place, the mere exhibition of antisocial personality traits is not enough to warrant commitment under such a statute.\textsuperscript{228} There must be a finding of antisocial (or other) personality disorder, not merely traits, and this disorder must be proven beyond a reasonable doubt.\textsuperscript{229} Further, all jurors must be unanimous in their decision.\textsuperscript{230} Then, the State has the burden of proving that this disorder is what causes the person to be likely to repeat his violent sexual crimes.\textsuperscript{231} This must also be proven beyond a reasonable doubt.\textsuperscript{232} All of these safeguards ensure that the government cannot become overzealous and seek to commit all sex offenders indefinitely.

Third, the evidence simply does not support a finding that prosecutors are abusing their discretion to continue to “punish” all sex offend-

\textsuperscript{225} The Supreme Court has upheld the protection of children as compelling, even when constitutional rights are at stake. \textit{See Ferber}, 458 U.S. 747 (upholding a conviction, despite a First Amendment challenge, under a law that banned the knowing promotion of a sexual performance by a child under age sixteen).

\textsuperscript{226} \textit{See Oral Argument, supra} note 207, at *9-14.

\textsuperscript{227} \textit{See id.} at *15.

\textsuperscript{228} \textit{See Kan. Stat. Ann. §§ 59-29a01 - 59-29a20.}

\textsuperscript{229} \textit{Id.} These diagnoses are based on the opinions of medical professionals, experts in their field. Further, the statutes provide for a defendant to have his own expert evaluation by a professional of his choosing, for which the State will pay if the defendant is indigent. \textit{Id.}

\textsuperscript{230} \textit{Id.}

\textsuperscript{231} \textit{Id.}

\textsuperscript{232} \textit{Id.}
ers, much less going after other categories of criminals.\textsuperscript{233} In Kansas, under two percent of sex offenders incarcerated for sexually violent crimes satisfying the statute have been committed pursuant to this law.\textsuperscript{234} In fact, of the few who have been committed, six are now in the process of release from the program.\textsuperscript{235} None of the six, though not completely discharged yet, has repeated their crimes.\textsuperscript{236} The statistics in other states are similar to Kansas.\textsuperscript{237} Prosecutors are only using this law in its intended capacity: to protect citizens from a “small but extremely dangerous group” of criminals.

Finally, the argument ignores the power of the courts to prevent the legislature from extending beyond constitutional bounds. The slippery slope argument cannot prevail as a reason to repeal these laws because it improperly dismisses the power of the courts. If the legislature began passing laws allowing for the civil commitment of burglars, for example, there is no question the courts would fulfill their duty and put a stop to the unconstitutional lawmaking.\textsuperscript{238} There is no need to prematurely assume the worst of the legislature and government when no evidence exists to support such a belief. The Supreme Court has often acknowledged its power to stop abuse of discretion if and when it arises.\textsuperscript{239} There is no occasion to doubt that power now.

2. The Validity of Legislation is Not Diminished Because the Public Requested It

It is true, as many scholars assert, that this legislation was prompted largely by societal pressure.\textsuperscript{240} However, societal need is a perfectly legitimate reason to enact new legislation. After all, this pressure came from parents of young children who ride their bikes around their neighborhoods, much like Earl Shriner’s seven-year-old victim did before he was savagely attacked and left to die. It came from sisters

\textsuperscript{233} See Brakel & Cavanaugh, supra note 42, at 79-81.
\textsuperscript{234} Id.
\textsuperscript{235} See Oral Argument, supra note 207, at *20.
\textsuperscript{236} Id.
\textsuperscript{237} See Brakel & Cavanaugh, supra note 42, at 79-81.
\textsuperscript{238} The Court in Hendricks noted that most criminals, non-sex offenders, are better dealt with by the criminal justice system. See Hendricks, 521 U.S. at 360.
\textsuperscript{239} See, e.g., Commodity Futures Trading Comm’n v. Schor, 478 U.S. 833 (1986) (declining to place an absolute prohibition on particular types of jurisdiction to avoid where “some hypothetical ‘slippery slope’ may deposit us”); see also Ballew v. Georgia, 435 U.S. 223 (1978) (exercising the Court’s authority to limit the number of jurors required to no fewer than six, despite an earlier ruling leaving the question open).
\textsuperscript{240} See generally Sarah E. Spierling, Lock Them Up and Throw Away the Key: How Washington’s Violent Sexual Predator Law Will Shape the Future Balance Between Punishment and Prevention, 9 J.L. & Pol’y 879 (2001); Dorsett, supra note 14; Brakel & Cavanaugh, supra note 42; King, supra note 14; Daley, supra note 14.
and brothers of those women who had been brutally raped by men like David Burdette.241 It came from outraged and frightened citizens who were being forced to share their neighborhoods with sexually violent child molesters like Kevin Haenchen,242 who should have been in a mental hospital rather than a suburban townhouse.

This pressure on legislatures to enact laws that would protect innocent victims, women and children who fell prey to these sex offenders, was not the result of a conspiracy to permanently imprison all the men in the country who had an occasional impure thought.243 It was the desire of a democracy to require a law to protect itself from the most dangerous and mentally ill recidivist criminals out there. Legislatures should be commended for responding, rather than condemned for doing so. It is their responsibility to act in the people's best interests, and often the people know what is in their best interests and are capable of communicating it to their government. Chief Justice William Rehnquist has written:

[A] presumption of constitutionality [for Congressional enactments] makes eminent good sense. If the Supreme Court wrongly decides that a law enacted by Congress is constitutional, it has made a mistake, but the result of its mistake is only to leave the nation with a law duly enacted by the popularly chosen member of the House of Representatives and the Senate and signed into law by the popularly chosen President. But if the Court wrongly decides that a law enacted by Congress is not constitutional, it has made a mistake of considerably greater consequence; it has struck down a law duly enacted by the popularly elected branches of government, not because of any principle in the Constitution but because of the individual views of desirable policy held by a majority of the nine justices at that time. Every time an individual or a group asserts a claim of constitutional right against a legislative act, the principle of majority rule and self-government is placed on one side of the judicial scale, and the principle of the individual right is placed on the other side of the scale. The function of the Supreme Court is, indeed, to hold

241. David Burdette was already a serial rapist in 1982, when he then began raping women he saw in a magazine article describing them as Omaha's ten most “eligible women.” He served less than six years for those rapes, was released, and began raping recently widowed women he discovered through the obituary columns in local newspapers. One woman was a young widow with two daughters, ages seven and eight. Burdette tied one child to each of the woman's arms and forced them to watch their mother's rape. See Don Sternberg, Why Nebraska Needs Civil Commitment Proceedings for Sex Offenders, 33 CREIGHTON L. REV. 721, 721 (2000).

242. Kevin Haenchen sexually assaulted twenty-seven children before being arrested in 1987. See Daley, supra note 14. He received only a ten-year sentence. Id. at 715. Before being released from prison, Haenchen promised to continue molesting children and decided to torture and kill them as part of a new fantasy he had developed. Id. He stated, “I know what will happen when I see a child. There's nothing a parent can do.” Id.

243. See KAN. STAT. ANN. § 59-29a01. The statute specifically targets “a small but extremely dangerous group.”
the balance true between these weights in the scale, and not to con-
sciously elevate one at the expense of the other.\textsuperscript{244}

3. A Delay in Treatment Does Not Render the Statute Criminal in
Nature

A particularly compelling argument that the commitment laws for
sex offenders are truly punitive lies in the fact that treatment is often
delayed until such time that the offender is going to be released from
prison.\textsuperscript{245} This situation may appear to prove that the commit-
mation law is truly criminal in nature, and not civil, as it has been deemed.
Although in the author's opinion, treatment should begin earlier, ab-
sence of such a provision does not render the law punitive.

First, the criminal laws do provide for incarceration when a person
commits a violent sexual crime.\textsuperscript{246} There is no reason to revoke the
state's right to punish merely because a provision to treat later is
available. Criminal law is used as a method to achieve goals of deter-
rence, incapacitation, rehabilitation, and retribution.\textsuperscript{247} In fact, treat-
ment for sex offenders is universally available for prisoners while
incarcerated, but many refuse to accept it, as Hendricks refused dur-
ing his prison career.\textsuperscript{248} Civil commitment laws are used to incapaci-
tate and rehabilitate.\textsuperscript{249} They do not serve all of the purposes of

\textsuperscript{244} \textsc{William H. Rehnquist, The Supreme Court} 279 (2001). The analogy between state
government enactments and federal governmental enactments can be easily drawn, especially
given the Court's historic respect of and deference to a state's interpretation of its own laws.
\textsc{Seling,} 531 U.S. at 270 (Scalia, J., concurring); \textsc{see R.R. Comm'n of Tex. v. Pullman Co.,} 312 U.S.
496, 500-01 (1941).

\textsuperscript{245} \textsc{See Hendricks,} 521 U.S. at 385 (Breyer, J., dissenting).

\textsuperscript{246} \textsc{See, e.g.,} 720 ILL. COMP. STAT. 5/12-13 (2002) (defining and describing Criminal Sexual
Assault and providing sentencing requirements for repeat offenders); 720 ILL. COMP. STAT. 5/12-
14 (defining Aggravated Criminal Sexual Assault); 720 ILL. COMP. STAT. 5/12-14.1 (defining
Predatory Criminal Sexual Assault of a Child); 720 ILL. COMP. STAT. 5/12-15 (defining Criminal
Sexual Abuse); 720 ILL. COMP. STAT. 5/12-16 (defining Aggravated Criminal Sexual Assault).

\textsuperscript{247} \textsc{See Sandy Kadish & Stephen J. Schulhofer, Criminal Law and Its Processes} 97-

\textsuperscript{248} \textsc{Leroy Hendricks} refused treatment several times during his ten-year sentence in Kansas.
\textsc{See John Douglas & Mark Olshaker, Obsession} 346 (Lisa Drew ed., 1998). Treatment in
prison is usually offered on a voluntary basis, and is often unsuccessful. "One reason for this is
that, even among the numerous murderers and other felons, sexual offenders, especially child
molesters, are despised by other inmates." \textsc{See Daley, supra note 14, at 719-20. Because of this
hatred, sex offenders will often not accept treatment, for fear that other inmates will learn of
their crimes. Id.}

\textsuperscript{249} \textsc{See Hendricks,} 521 U.S. at 363-66. The Court recognized that confinement of danger-
ously mentally ill persons for the protection of society "is a legitimate non-punitive governmen-
tal objective and has been historically so regarded." \textsc{Id.} at 363. Further, the Court noted that
"incapacitation may be a legitimate end of the civil law." \textsc{Id.} at 366. \textsc{See also KAN. STAT. ANN.}
\S\S 59-29a01 - 59-29a20 (establishing civil commitment procedure for "the long-term care and
treatment of the sexually violent predator").
criminal laws and thus should not be substituted for them. Further, civil commitment procedures allow for the Department of Corrections to perform its duties before the more expensive treatment provided by the statutes is imposed. It is the hope that civil commitment will not be necessary after incarceration, as is true in over ninety-eight percent of the Kansas cases involving sex offenders. Civil commitment is the last resort, the final hope for treating the severely ill, to be utilized only after efforts during incarceration have failed.

4. Civil Commitment of a Sexual Predator is Not Necessarily a Life Sentence

The Kansas Act’s indefinite period of confinement is seen as a life sentence for many offenders. This may be true, but commitment will not result in lifetime confinement for those who accept and participate in their own treatment and who actively engage in their own recovery. Those offenders will be reintegrated into society as healthier citizens. Offenders who refuse to participate in the therapy will not rejoin society as soon, but is this undesirable from society’s standpoint? Of course it is undesirable from the offenders’ standpoint, but so is incarceration in the first place. The criminal justice system does not release criminals into society simply because they do not enjoy prison. Why should the mental health system release dangerous, untreated individuals into society just because they want to go? Violent sexual predators who deny they have a problem and refuse to take responsibility for their actions or participate in treatment have no place near our children. These are not the rehabilitated citizens ready to re-enter society, they are instead sick individuals in need of help, even if they cannot admit it.

The only criminals “harmed” by the civil commitment system are those completely untreated predators who were fortunate enough to obtain a plea bargain for less than life imprisonment because, but for the statute, they would escape without treatment. Offenders who received life sentences, treatable or not, will not encounter the program, so it is irrelevant to them. Treatable offenders will receive help and be reintegrated into society. If mandatory life sentences were handed out for all those offenders described by the predator statute, many treatable offenders would never regain their liberty.

250. See Brakel & Cavanaugh, supra note 42, at 79-81.
5. The Fact That These Statutes Do Not Prevent All Sexual Offenders from Victimizing Does Not Diminish Their Value

Civil commitment statutes keep some dangerous predators away from children. However, it has been argued that the "real" sex criminals are still at large, as many sex offenders are relatives of their victims and are never apprehended, and these statutes are ineffective at handling the problem. While many sex offenders are never caught, these statutes address a very dangerous group of criminals and are essential to preventing further crimes from being committed by the ones that are caught. Simply because these statutes do not address every type of sex offender does not diminish their appropriateness or justify their repeal. In fact, if they help reduce violent sex crimes at all, they should be applauded, not attacked.

Despite the many arguments in opposition of civil commitment for sexual predators, the courts, including the Supreme Court, continue to uphold its constitutionality. However, the Kansas Supreme Court's decision could have had disastrous consequences had it been upheld. The following section addresses that issue as well as the impact the current requirements may have on the system.

IV. Impact of Kansas v. Crane

The impact of the Kansas Supreme Court's decision would have been frightening. The impossible standard would have completely undermined the Kansas Act, making it unenforceable. Fortunately, the United States Supreme Court prevented that result, but the impact of its decision is uncertain. If other courts interpret the decision as permission to require almost total lack of control, the result may be similar. On the other hand, as this Comment argues and Justice Scalia has asserted, the additional finding of a lack of control is unnecessary because it was already incorporated into the Kansas Act's requirements. Based on this, the practical impact may be minimal, because if the State can prove a mental abnormality in the first place, some degree of inability to control will accompany the diagnosis and should be
readily apparent to the fact finder. Thus, the burden of an additional finding may be small.

There will be courts, though, like the Kansas Supreme Court, that disfavor this type of legislation and will interpret the holding to mean an almost total lack of control must be proved. The potential impact in those jurisdictions is explored below. The effects discussed could also result if courts disallow emotional or cognitive impairments to function as a basis for commitment.

A. Danger to Society

If courts endorse an unreasonably high standard of proof, as the Supreme Court's decision may allow them to do, many sex offenders will be free to commit violent sex crimes upon new victims. Although only between one and ten percent of sex offenders are subsequently committed under sexual predator statutes, that one or two or ten percent could be released into America's neighborhoods rather than being detained in a treatment facility. A man like Earl Shriner, for example, could move in next door to a family with a seven-year-old boy, unhindered to continue his criminal plan. Children and women across the nation would again be subjected to convicted and violent sexual predators who served time in prison and were likely to have rejected therapy while incarcerated. These laws exist to protect society from the worst type of violent criminal, and their purpose is circumvented by insistence on an improvable standard.

B. Economic Impact

Although the physical and psychological harm done to victims of sex offenders is of course the foremost concern, impact on the economy is always a consideration when evaluating government legisla-

252. See Brackel & Cavanaugh, supra note 42, at 81.
253. For a discussion of Earl Shriner's crimes, see supra INTRODUCTION.
254. It has been repeatedly noted that prisoners have a right to refuse treatment in prison, and sex offenders very often do refuse such treatment. Leroy Hendricks was one such prisoner who refused treatment for pedophilia while incarcerated. See Hendricks, 521 U.S. at 354-55; see also Robert M. Wettstein, Predators and Politics: A Psychiatric Perspective on Washington's Sexually Violent Predators Statute, 15 U. PUGET SOUND L. REV. 597, 614 (1992) (discussing how the "violent, threatening atmosphere of a correctional facility socializes an offender into never showing weakness or vulnerability and dissuades him from discussing his crimes, especially those involving the rape and murders of children"). This atmosphere apparently discourages many inmates from obtaining treatment while in prison. However, should society have to accept an untreated criminal because he refused treatment based on a fear of inmate aggression at the disclosure of his crimes? If an offender is not even willing to undergo treatment to ensure he does not reoffend when released, he is clearly not ready for release in the first place.
tion. Both the cost to victims for treatment and the government for providing therapy to the offenders must be considered.

Victims of the most violent and traumatic crimes may need inpatient psychiatric care for a period following the attack. The cost of this treatment begins at approximately $1000 per day and increases with the need for prescription drugs or other physical care.\footnote{Estimate obtained from St. James Hospital, Olympia Fields, Illinois.} Victims without the money or need for inpatient care may opt for outpatient care; specifically, hour-long sessions with a psychiatrist or psychologist on a regular basis. Although it is impossible to determine the costs for the "average victim," costs for this type of treatment can range from $2000 per year for monthly sessions in a midwestern suburban clinic, to $9000 per year for weekly sessions in the same clinic.\footnote{Estimate obtained from Suburban Heights Medical Center, Psychiatry Department, Chicago Heights, Illinois. Specifically, for a victim of a sex trauma, a psychiatrist will meet with the patient for an initial consultation, at a cost of $237.00. The following week, the patient will attend another session, at a cost of $171.00. All subsequent visits will be billed at $171.00.} These estimates vary by geographical location and do not include any prescription medications that may be needed. It is important to keep in mind that the average salary for an American is less than $30,000.\footnote{See Salary Too Small? Try Moving to Connecticut, U.S. News & World Rep., May 7, 2001, available at http://www.usnews.com (last visited Feb. 18, 2003) (reporting that average American salary in 2000 was $29,676).} Many victims of sex crimes cannot afford this expensive treatment, and turn to support groups or clergy members for counseling. These estimates provide a rough picture of the financial cost of therapy for victims, but cannot begin to encompass the other costs to a victim, including the possible loss of employment, deterioration of romantic relationships, and constant fear of another attack. These life-altering costs cannot be quantified.

The cost of treating sex offenders, which can be quantified, is also quite high. In 1998 and 1999, California spent just over $31 million on the sex offender program, about 2% of its mental health services budget.\footnote{See Brackel & Cavanaugh, supra note 42, at 89.} The cost per inmate treated was about $107,000.\footnote{Id.} As more offenders are committed, obviously the total program cost will increase. Proportionately, however, only 2% of the California budget goes toward treating predators and, thus, possibly preventing future horrible crimes. Society's safety from predators is surely worth such a small fraction of the government's resources. Further, it is estimated that pedophiles have an average of 150 victims each,\footnote{See supra note 33 and accompanying text.} making the
cost of treating the victims of just one pedophile between $300,000 and $1.35 million annually. 261

If, however, courts are concerned about high treatment costs for offenders, awareness of these amounts may encourage imposing longer prison sentences for those offenders the courts deem “untreatable.” In fact, in the wake of the widespread enactment of sexual predator laws, many states have increased prison sentences for repeat sex offenders. 262 More repeat sex offenders are now serving longer sentences, and some states have passed mandatory life sentences for certain sex offenders. 263 Longer prison sentences clearly cut costs for treatment programs, as incarceration (including voluntary therapy) is about one-fifth the cost of formal sex offender treatment. 264 If a certain offender is truly thought to be untreatable, then a life sentence may be the only way to protect society. However, many sex offenders are treatable, and should be given the opportunity to rehabilitate and make a positive contribution to society. The sexual predator laws allow for both scenarios, as offenders are released when and if they are deemed fit to rejoin society. 265

V. CONCLUSION

The advantages of allowing civil commitment for sexually violent predators pursuant to the Kansas Act are compelling and warrant the government’s exercise in restraining offenders’ liberty. Criminals who commit violent sexual crimes are among the most dangerous type of criminal. These offenders differ from other criminals in many ways, necessitating that they be considered in a category of their own for purposes of confinement, punishment, and treatment.

The civil commitment of sexual predators protects society from these dangerous individuals. Commitment also provides violent sex offenders with desperately needed treatment. Studies show that although treatment will not obviate the problem of recidivism entirely,

261. See supra note 256 and accompanying text (approximating costs for treatment of victims).
264. See Brackel & Cavanaugh, supra note 42, at 88.
265. See supra notes 41-53 and accompanying text.
it does help.\textsuperscript{266} In fact, it may reduce recidivism by as much as thirty percent.\textsuperscript{267} States that have enacted sexual predator commitment laws have worked diligently to design programs that benefit the patient. The laws work toward achieving the goals they were designed to achieve—sexually violent offenders are kept away from society so they cannot harm more victims and treatment is provided to reduce or eliminate their recidivism upon release.\textsuperscript{268} These laws are constitutional, as evidenced by prior Supreme Court decisions, and necessary, as evidenced by tragedies such as one that occurred after Earl Shriner was released from prison.

The Supreme Court has consistently upheld civil commitment statutes for sexually violent offenders, and fortunately, is not discontinuing the practice now. However, the Kansas Act should have been enforced as written, without the modification required by the United States Supreme Court. Given the Selig decision, as well as the Hendricks decision, the Supreme Court had ample precedent to reverse the Kansas Supreme Court’s misinterpretation of Hendricks and enforce the Kansas Sexually Violent Predator Act as it was written.

Jennifer Ann Smulin*


\textsuperscript{267} Id.

\textsuperscript{268} See supra notes 40-64 and accompanying text. For discussion of treatment methods used in several states with sexual predator laws, see John Kip Cornwell et al., The New Jersey Sexually Violent Predator Act: Analysis and Recommendations for the Treatment of Sexual Offenders in New Jersey, 24 SETON HALL LEGIS. J. 1 (1999). The article describes the phase method employed by many states that is based on a cognitive-behavioral/relapse prevention model. \textit{Id.} at 16. “Increasing victim empathy, developing relapse prevention skills, acquiring interpersonal skills, managing negative emotions, and decreasing deviant sexual arousal are common elements of almost all programs reviewed.” \textit{Id.} at 19.

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