

Out of Control: An Ambiguous Decision Raises the Question of Exactly Who Has Control **[*Kansas v. Crane*, 534 U.S. 407 (2002)]**

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*Not only is the new law that the Court announces today wrong, but the Court's manner of promulgating it – snatching back from the State of Kansas a victory so recently awarded – cheapens the currency of our judgments.*¹

I. INTRODUCTION

When he was fifteen years-old, Dennis Linehan was sent to reform school for sexually molesting a four-year-old girl.² Four years later, Linehan had sex with a thirteen-year-old female.³ At age twenty-two, he and another man forced a young woman into a field where they beat and repeatedly raped her.⁴ Two years later, Linehan kidnapped a fourteen-year-old babysitter with the intent of sexually assaulting her.⁵ However, when she resisted, Linehan choked her to death and then hid her body in the woods.⁶

In the little time before he was captured for this crime, Linehan forced a twenty-two-year-old woman to have nonconsensual sex with him at a party.⁷ Subsequently, he molested two girls while they were sleeping in their beds.⁸

Linehan was later sentenced to a maximum of forty years in prison, after pleading guilty to kidnapping, and the murder charges were dropped.⁹ After serving ten years in prison, however, Linehan escaped, and eleven days later, he stalked and assaulted a twelve-year-old girl.¹⁰ Following his recapture and parole, the State of Minnesota attempted to commit Linehan as a “sexually dangerous person.”¹¹ The trial court concluded that since Linehan had committed numer-

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1. *Kansas v. Crane*, 534 U.S. 407, 416 (2002) (Scalia, J., dissenting).

2. *In re Linehan*, 557 N.W.2d 171, 175 (Minn. 1996); see also Alan Held, *The Civil Commitment of Sexual Predators – Experience Under Minnesota Law*, in *THE SEXUAL PREDATOR* 2-3 (Anita Schlank & Fred Cohen eds., 1999).

3. *In re Linehan*, 557 N.W.2d at 175.

4. Held, *supra* note 2, at 2-3.

5. *Id.*; see also *In re Linehan*, 557 N.W.2d at 175.

6. Held, *supra* note 2, at 2-3.

7. *Id.*

8. *Id.*

9. *Id.*; see also *In re Linehan*, 557 N.W.2d at 175.

10. *In re Linehan*, 557 N.W.2d at 175.

11. See *id.* at 175-76.

ous sexual offenses, was diagnosed with an antisocial personality disorder, and posed a high probability of future dangerousness, he should be civilly committed under Minnesota's Sexually Dangerous Persons Act.¹²

Sexual predator laws attempt to protect society from people like Linehan, who continually offend due to some sort of a mental disorder.¹³ Many individuals support sexual predator laws as effective means of protecting society, while providing confinement and treatment to offenders who remain dangerous due to mental abnormalities or personality disorders.¹⁴ Yet, critics argue that sexual predator acts "trample on the civil liberties of sex offenders by involuntarily committing them to indefinite treatment subsequent to incarceration."¹⁵

Regardless of one's opinion of sexual predator laws, *Kansas v. Crane*¹⁶ is treacherous precedent due to its ambiguity and unanswered questions.¹⁷ In *Crane*, the United States Supreme Court held that the Kansas Supreme Court misinterpreted *Kansas v. Hendricks*¹⁸ and the Kansas Sexually Violent Predator Act (Kansas SVPA), when it held that proof of "total or complete lack of control" of sexual behavior was required to civilly commit a sexual predator.¹⁹ The Court held that this new requirement was too radical of a change from *Hendricks*, which had recently upheld the Kansas SVPA.²⁰ However, the United States Supreme Court held that *Hendricks* did imply a requirement of "proof of serious difficulty in controlling behavior" in order for a sexual predator statute to satisfy substantive due process.²¹ Although the United States Supreme Court seemed to be moderating the Kansas Supreme Court's strict "total or complete lack of control" requirement, this was a problematic compromise.

In reaching this decision, the Court arguably misinterpreted *Hendricks* and also overlooked a long line of its own case precedent, which suggests that this issue should have been deferred to the state legislature.²² Additionally, this decision could have provided states with guidance as to what degree of proof is required for commitment, to what illnesses this new standard applies, and how the lack of con-

12. *Id.* at 174. Linehan's commitment was later affirmed by the Supreme Court of Minnesota. *Id.* at 191.

13. See Carla Stovall, *The State's Response to Sexual Offenders*, 7 KAN. J.L. & PUB. POL'Y 29, 35 (1998).

14. *Id.*

15. *Id.*

16. 534 U.S. 407 (2002).

17. See *infra* notes 228-99 and accompanying text.

18. 521 U.S. 346 (1997).

19. *Crane*, 534 U.S. at 411.

20. See *id.*

21. *Id.* at 412.

22. See *infra* notes 173-227 and accompanying text.

trol is to be proven.²³ However, it did not. The *Crane* decision has also left many wondering what additional issues will arise in its aftermath, as its vagueness almost guarantees that the Court will review this issue again.²⁴ Finally, in Justice Antonin Scalia's dissent, he warns that the opinion sends a dangerous message that states should not rely too heavily on United States Supreme Court precedent in this area of law.²⁵ As a result, Justice Scalia stated that what was recently found constitutional by the Court, the Kansas SVPA as written, may soon be unconstitutional with little convincing explanation.²⁶

II. CASE DESCRIPTION

Michael T. Crane had been arrested, charged, or convicted of eighteen various offenses prior to the crimes that he committed on January 6, 1993, which led to *Kansas v. Crane*.²⁷ Crane's previous sexual offenses included a conviction of "sexual abuse in the first degree, as well as arrest or charges for indecent exposure (several times), sexual assault, felony attempted forcible rape, felony sexual abuse, and abuse of a child."²⁸ These offenses, as well as the offenses Crane committed on January 6, caused the State of Kansas to attempt to have him civilly committed as a sexually violent predator.²⁹

Around 7:00 p.m. on January 6, Crane entered a tanning salon in Johnson County, Kansas, and was escorted to a private tanning room by the only attendant.³⁰ However, Crane exited the room about ten minutes later and exposed himself to the nineteen-year-old female attendant, while making sexual gestures and remarks, before leaving the salon.³¹

About thirty minutes later, Crane entered a busy video store not far from the tanning salon.³² He asked the twenty-year-old female clerk for assistance in finding a video.³³ According to the clerk, while she helped Crane find the video, he stood so close to her that "their arms brushed."³⁴ Crane then left the video store; however, he re-

23. See *infra* notes 228-65 and accompanying text.

24. See *infra* notes 266-99 and accompanying text (explaining the possible effects that *Crane* may likely have on commitment rates, as well as the dangerous comparison between the new "lack of control" standard and the irresistible impulse test).

25. See *Crane*, 534 U.S. at 424 (Scalia, J., dissenting).

26. See *id.*; see also *infra* notes 294-99 and accompanying text.

27. State v. Crane, 918 P.2d 1256, 1258 (Kan. 1996) [hereinafter *Crane I*]; Brief of Petitioner at 3, *Kansas v. Crane*, 534 U.S. 407 (2002) (No. 00-957).

28. Brief of Petitioner at 3, *Crane* (No. 00-957).

29. See *id.* at 2-3.

30. *Crane I*, 918 P.2d at 1258.

31. *Id.*

32. *Id.* at 1259.

33. *Id.*

34. *Id.*

turned twenty minutes later and waited until he was the only remaining customer.³⁵

Once he was alone with the female clerk, Crane grabbed her from behind and attempted to carry her to the back of the store.³⁶ When the clerk “got her feet back on the ground,” Crane attempted to push her to the floor.³⁷ Then, exposing his genitals, Crane ordered the clerk three times to perform oral sex, and then he told the clerk that “he was going to rape her.”³⁸ However, without reason, Crane suddenly ran from the store.³⁹

Crane was convicted of lewd and lascivious behavior for the offenses in the tanning salon, and attempted rape, attempted aggravated criminal sodomy, and kidnapping for the video store offenses.⁴⁰ His sentence was thirty-five years to life in prison.⁴¹ Crane then appealed his convictions.⁴²

On June 7, 1996, the Kansas Supreme Court affirmed Crane’s lewd and lascivious behavior conviction.⁴³ Nevertheless, the court reversed the attempted aggravated criminal sodomy, attempted rape, and kidnapping convictions.⁴⁴ The State then re-filed the attempted aggravated criminal sodomy and attempted rape charges.⁴⁵

Subsequently, the State agreed to enter plea negotiations with Crane, and in August 1997, Crane pled guilty to aggravated sexual battery.⁴⁶ Due to his plea, Crane was sentenced to three to ten years; however, at this point Crane had already been in prison for four and one-half years.⁴⁷ Therefore, in January of 1998 when Crane was set for release on parole, the State filed a petition to have Crane civilly committed under the Kansas SVPA.⁴⁸

After a commitment hearing where the State’s mental health officials “testified that Crane suffer[ed] from antisocial personality disorder

35. *See id.*

36. *In re Crane*, 7 P.3d 285, 286 (Kan. 2000), *vacated by* *Kansas v. Crane*, 534 U.S. 407 (2002).

37. *Crane I*, 918 P.2d at 1259.

38. *In re Crane*, 7 P.3d at 286.

39. *Id.*

40. *See Crane I*, 918 P.2d at 1258.

41. *Id.*

42. *See* Brief for Respondent at 2, *Kansas v. Crane*, 534 U.S. 407 (2002) (No. 00-957).

43. *Crane I*, 918 P.2d at 1274.

44. *Id.* Crane’s attempted aggravated sodomy and attempted rape convictions were reversed because of the complaints’ failure to properly inform Crane of the charges against him. *Id.* at 1269. Additionally, the kidnapping conviction was reversed as the court found that Crane’s moving of his victim was “inconsequential.” *Id.* at 1273.

45. Brief for Respondent at 2, *Crane* (No. 00-957).

46. *Id.* at 2-3.

47. *Id.*

48. *Id.* at 3. The Kansas Sexually Violent Predator Act allows for the involuntary civil commitment of “sexually violent predators who have a mental abnormality or personality disorder and who are likely to engage in repeat acts of sexual violence if not treated for their mental abnormality or personality disorder.” KAN. STAT. ANN. § 59-29a01 (1994 & Supp. 2002).

der and exhibitionism, with increasing frequency and intensity of his violent, criminal sexual behavior,” Crane was committed as a “sexually violent predator.”⁴⁹ Crane then appealed this decision to the Kansas Supreme Court, and on July 14, 2000, the court reversed Crane’s commitment.⁵⁰ The Kansas Supreme Court held that civil commitment without a “finding that the defendant cannot control his dangerous behavior” was unconstitutional.⁵¹ The court interpreted the United States Supreme Court’s decision in *Hendricks* as requiring a finding of inability to control behavior and reasoned that a lack of control was necessary to keep the civil system from being used simply to impose punishment.⁵²

The State of Kansas then appealed to the United States Supreme Court.⁵³ The Court granted certiorari to decide whether substantive due process required a state to prove lack of control in order to commit a person as a sexual predator.⁵⁴

III. BACKGROUND

The purpose of the Kansas SVPA is to allow the state to involuntarily civilly commit “sexually violent predators” for confinement and treatment.⁵⁵ Based upon a conviction or charge of a “sexually violent offense,” the Attorney General may request the commitment of those individuals suffering from a “mental abnormality or personality disorder” who are “likely to engage in repeat acts of sexual violence if not treated.”⁵⁶ If, upon a unanimous verdict, the jury determines beyond

49. Brief of Petitioner at 7-8, *Crane* (No. 00-957).

50. *In re Crane*, 7 P.3d 285, 285, 294 (Kan. 2000), *vacated by Crane*, 534 U.S. 407.

51. *Id.* at 290.

52. *See id.* at 293. It is notable that in this decision, the Kansas Supreme Court seemed to be very concerned with the prosecutor’s actions in the proceedings of this case. *See generally id.* The court noted multiple times that the prosecutor had assured Crane’s victim that even if Crane’s sentence were reduced due to a plea bargain, his confinement would be extended because of sexual predator commitment. *Id.* at 287, 292. Although these concerns are meritorious, it may suggest that the court overzealously interpreted the United States Supreme Court’s decision in *Hendricks* to reach the outcome it desired.

53. *Kansas v. Crane*, 532 U.S. 957, 957 (2001) (granting cert.).

54. *Id.*; *see also Kansas v. Crane*, 534 U.S. 407, 409 (2002).

55. KAN. STAT. ANN. § 59-29a01 (1994 & Supp. 2002). Some relevant definitions in the act are:

1. “‘Sexually violent predator’ means any person who 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.” *Id.* § 59-29a02.
2. “‘Mental abnormality’ means a congenital or acquired condition affecting the emotional or volitional capacity which predisposes the person to commit sexually violent offenses in a degree constituting such person a menace to the health and safety of others.” *Id.*
3. “‘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.” *Id.*

56. *Id.* § 59-29a01. Pursuant to section 59-29a03, prison officials are required to give written notice to the Attorney General ninety days prior to the time an individual who “may meet the criteria of a sexually violent predator” is released from serving a prison sentence for a sexually

a reasonable doubt that an individual is a sexually violent predator, “the person shall be committed to the custody of the secretary of social and rehabilitation 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.”⁵⁷

The State of Washington passed the first civil commitment statute to deal with “repetitive sex offenders” in 1990.⁵⁸ Since then, at least eighteen states have passed similar sexual predator civil commitment statutes.⁵⁹ The Kansas SVPA, enacted in 1994, is very similar to the Washington “Sexual Predator Law.”⁶⁰

The various sexual predator acts were derived from the states’ power of civil commitment. Civil commitment is generally defined as “commitment of a person who is ill, incompetent, drug-addicted, or the like, as contrasted with a criminal sentence.”⁶¹ There are two ba-

violent crime, or is released due to any of the following reasons: a finding of incompetence to stand trial, an acquittal of a sexually violent offense due to insanity, or a finding of “not guilty of a sexually violent offense pursuant to K.S.A. 22-3428.” *Id.* § 59-29a03. Then, at the Attorney General’s discretion, if he or she feels that an individual meets the requirements of the Kansas SVPA, he or she may file a petition with the trial court requesting civil commitment. *Id.* § 59-29a04. Next, if the trial judge finds probable cause that the individual is a sexual predator, the judge “shall direct that person be taken into custody.” *Id.* § 59-29a05(a). The offender then has the right to contest probable cause at a hearing within seventy-two hours of being taken into custody. *Id.* § 59-29a05(b). However, if probable cause is found, the detainee must be transferred to a facility “for an evaluation [by a professional] as to whether the person is a sexually violent predator.” *Id.* § 59-29a05(d). Following the individual’s transfer, the court has sixty days to conduct a trial to decide if the individual is a sexually violent predator. *Id.* § 59-29a06.

57. *Id.* § 59-29a07(a). There are three methods of release under the Kansas SVPA. *Id.* §§ 59-29a08 to -29a11. First, a mental examination must be conducted once a year to determine if an offender’s “mental abnormality or personality disorder has so changed that the person is safe to be placed in transitional release.” *Id.* § 59-29a08(b). If so, a hearing will be set at which the State has the burden of proving beyond a reasonable doubt that the individual is not ready for transitional release due to a likelihood of repeat sexual offenses. *Id.* Secondly, if the Secretary of Social and Rehabilitation Services decides that the individual is ready for release, he or she “shall authorize the person to petition the court for transitional release.” *Id.* § 59-29a10(a). The court then has thirty days to order a hearing to determine whether the offender is fit to be released. *Id.* Finally, there is no prohibition on the offender filing a petition at any time during his commitment; however, if the secretary does not approve the petition, or the court finds the petition “frivolous” (i.e. the offender’s condition has not changed), the court “shall” deny the petition. *Id.* § 59-29a11.

58. Georgia Smith Hamilton, Case Note, *The Blurry Line Between “Mad” and “Bad”: Is “Lack-Of-Control” a Workable Standard for Sexually Violent Predators?*, 36 U. RICH. L. REV. 481, 487 (2002); see also Austin T. DesLauriers & Jim Gardner, *The Sexual Predator Treatment Program of Kansas*, in *THE SEXUAL PREDATOR* 11-2 (Anita Schlank & Fred Cohen eds., 1999).

59. See, e.g., Ariz. Rev. Stat. §§ 36-3701 to -3717 (Supp. 2002); Cal. Welf. & Inst. Code §§ 6600-6609.3 (West 1998 & Supp. 2003); Fla. Stat. Ann. §§ 394.910-.931 (West 2002 & Supp. 2003); 725 Ill. Comp. Stat. Ann. 207/1 to 207/99 (West 2002); Iowa Code Ann. §§ 229A.1-.16 (2000 & Supp. 2002); Kan. Stat. Ann. §§ 59-29a01 to -29a20 (1994 & Supp. 2002); Mass. Ann. Laws ch. 123A, §§ 1-11 (Law. Co-op. 1989 & Supp. 2002); Minn. Stat. Ann. § 253B.02 (West 1998 & Supp. 2003); Mo. Ann. Stat. §§ 632.480-.513 (West 2000 & Supp. 2003); Neb. Rev. Stat. §§ 29-2921 to -2936 (1995); N.J. Stat. Ann. §§ 2C:47-1 to 8 (West 1995 & Supp. 2002); N.D. Cent. Code §§ 25-03.3-01 to -23 (Supp. 2001); S.C. Code Ann. §§ 44-48-100 to -170 (Law. Co-op. 2002 & Supp. 2002); Tex. Health & Safety Code Ann. §§ 841.001-.147 (Vernon Supp. 2003); Utah Code Ann. §§ 77-16-1 to 5 (1999 & Supp. 2001); Va. Code Ann. § 19.2-300 (Michie 2000); Wash. Rev. Code §§ 71.09.010 to 71.09.902 (2002 & Supp. 2003); Wis. Stat. Ann. §§ 980.01-.13 (West 1998 & Supp. 2002).

60. DesLauriers & Gardner, *supra* note 58, at 11-2 to 11-3.

61. BLACK’S LAW DICTIONARY 112-13 (2d pocket ed. 2001).

sic sources from which the states gain their ability to civilly commit: police power and *parens patriae* power.⁶² The police power is the general power of the government to commit those individuals who pose a public safety threat.⁶³ The best example of this power is the civil commitment of insanity acquittees who are either incompetent to stand trial or so insane that they cannot be held responsible for their crimes.⁶⁴ *Parens patriae* power, on the other hand, is the power that the state has to commit those “individuals who lack the ability to care for themselves.”⁶⁵

A state’s power to civilly commit sexual predators seems to lie in between these two powers.⁶⁶ Sexually violent predator acts attempt to commit “individuals who are both mentally ill and dangerous.”⁶⁷ The United States Supreme Court has been very active in examining the limits of sexual predator acts and the general power of states to civilly detain individuals.⁶⁸

A. *The Evolution of Civil Commitment*

The constitutionality, as well as the standards and boundaries of the involuntary civil commitment of individuals, has developed, and continues to develop, through relevant United States Supreme Court decisions. Although the Court has gone back-and-forth between broadening and narrowing the states’ power to civilly commit individuals, the Court has always upheld two main requirements: a mental illness and dangerousness.⁶⁹

First, in *Humphrey v. Cady*⁷⁰ the Court upheld a sex crimes statute conditioned on a jury’s decision that a defendant was mentally ill, treatable, and posed harm to himself and society.⁷¹ The substantive due process requirements for civil commitment were further defined in *Addington v. Texas*.⁷² In *Addington*, although the Court held that “[w]hether an individual [was] mentally ill and dangerous to either himself or others”⁷³ must be determined by clear and convincing evidence, it upheld the states’ power to civilly commit.⁷⁴ The Court clari-

62. Hamilton, *supra* note 58, at 483.

63. *Id.* at 483-84.

64. Eric S. Janus, *Sex Offender Commitments: Debunking the Official Narrative and Revealing the Rules-in-Use*, 8 STAN. L. & POL’Y REV. 71, 72 (1997).

65. Hamilton, *supra* note 58, at 484.

66. David J. Gottlieb, *Preventative Detention of Sex Offenders*, 50 U. KAN. L. REV. 1031, 1036 (2002).

67. Hamilton, *supra* note 58, at 484.

68. *See infra* notes 70-115 and accompanying text.

69. *See Reply Brief at 1, Kansas v. Crane*, 534 U.S. 407 (2002) (No. 00-957).

70. 405 U.S. 504 (1972).

71. *See generally id.*

72. 441 U.S. 418 (1979).

73. *Id.* at 429.

74. *Id.* at 433. Additionally, the Court reasoned that the standard of proof for civil commitment of an individual must be greater than a preponderance of the evidence due to the “weight

fied that the “state has a legitimate interest under its *parens patriae* powers in providing care to its citizens who are unable . . . to care for themselves . . . [and] authority under its police power to protect the community” from any individuals who posed a danger to society.⁷⁵

Following *Addington*, the Court broadened civil commitment powers by ruling in *Jones v. United States*⁷⁶ that “[d]ue process is flexible and calls for such procedural protections as the particular situation demands.”⁷⁷ The Court held that even when an insanity acquittee proved his insanity defense by a preponderance of the evidence, he could still be constitutionally committed to a mental institution until he could prove that he was no longer insane, or no longer posed a threat to himself or society.⁷⁸ Additionally, the Court explained that when reviewing enactments of Congress for constitutionality, the “courts should pay particular deference to *reasonable* legislative judgments.”⁷⁹

The United States Supreme Court again expanded the horizons of civil commitment in *Allen v. Illinois*.⁸⁰ The Court stated that “[h]ere, as in *Addington*, [the] essence of federalism is that states must be free to develop a variety of solutions to problems and not be forced into a common, uniform mold.”⁸¹ In holding that proceedings under the Illinois Sexually Dangerous Persons Act were not criminal,⁸² the Court stated that “Illinois’ decision to supplement its *parens patriae* concerns with measures to protect the welfare and safety of other citizens does not render the Act punitive.”⁸³

In the landmark *Hendricks* decision, the United States Supreme Court once more broadened the states’ power to civilly commit sexually violent predators.⁸⁴ In *Hendricks*, the Court resolved the dispute over the constitutionality of sexually violent predator statutes and up-

and gravity” of involuntary civil commitment. *Id.* at 427. However, the Court further clarified that neither a finding of beyond reasonable doubt, or unequivocal proof, was required for constitutionality because that would impose too harsh of a burden on the state “given the uncertainties of psychiatric diagnosis.” *Id.* at 432.

75. *Id.* at 426.

76. 463 U.S. 354 (1983).

77. *Id.* at 367-68 (quoting *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972)).

78. *See id.* at 370. The Court held that the clear and convincing evidence standard established in *Addington* was not required. *Id.* at 367-68. The Court reasoned that because insanity acquittees had admitted that they committed a crime, the “risk of error concern” in *Addington* was not as great. *Id.* at 367. Therefore, the Court stated that such a high standard was not required. *Id.*

79. *Id.* at 365 (emphasis added).

80. 478 U.S. 364 (1986).

81. *Id.* at 375 (quoting *Addington v. Texas*, 441 U.S. 418, 431 (1979)).

82. *Id.*

83. *Id.* at 373. The Court reasoned that since the State did not seek punishment, but rather treatment, and released individuals after they were found no longer dangerous, the Act did not “appear to promote either of the traditional aims of punishment — retribution and deterrence.” *Id.* at 370 (quoting *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168 (1963)).

84. *See generally* *Kansas v. Hendricks*, 521 U.S. 346 (1997).

held the states' power to involuntarily civilly commit sexually violent predators.⁸⁵

Leroy Hendricks, a child molester with a long criminal history, was the first individual to be committed under the Kansas SVPA.⁸⁶ However, Hendricks appealed his commitment to the Kansas Supreme Court, which found the Kansas SVPA unconstitutional because a mental abnormality or personality disorder does not constitute a mental illness.⁸⁷ Consequently, because due process required a finding of both mental illness and danger to self or others, the court held that "the Act violate[d] Hendricks' substantive due process rights."⁸⁸ The State then appealed this decision to the United States Supreme Court.⁸⁹

The Court first tackled the issue of whether the Kansas SVPA's "definition of 'mental abnormality' satisfies 'substantive' due process requirements."⁹⁰ The Court reasoned that states have been allowed circumstances of involuntary civil commitment of individuals "who are unable to control their behavior and who thereby pose a danger to the public health and safety."⁹¹ The Court explained that it had "consistently upheld . . . [civil commitment] pursuant to proper procedures and evidentiary standards."⁹² The Court articulated that since the requirements of the statute limit "civil confinement to those who suffer from a volitional impairment rendering them dangerous beyond their control," the Kansas SVPA was constitutional.⁹³

However, the Court then clarified that "[t]he precommitment requirement of a 'mental abnormality' or 'personality disorder' is consistent with the requirements of these other statutes that we have upheld in that it narrows the class of persons eligible for confinement to those who are unable to control their dangerousness."⁹⁴ The Court then reasoned that "[t]o the extent the civil commitment statutes [it had] considered [in the past] set forth criteria relating to an individual's

85. *See id.* at 371.

86. *Id.* at 350. Leroy Hendricks was convicted of "taking indecent liberties" with two boys in 1984 and served almost ten years of his sentence before he was scheduled for release. *Id.* at 353. However, just before he was to be released, the State of Kansas filed a petition to have Hendricks committed as a sexually violent predator. *Id.* at 354. Hendricks had been convicted and released five times for various sexual molestation offenses before his conviction in 1984. *See id.* Due to his diagnosis as a pedophile and his own admission that "when he 'get[s] stressed out,' he 'can't control the urge' to molest children," a jury unanimously found Hendricks to be a sexually violent predator. *Id.* at 355. The trial court then found that pedophilia was a "mental abnormality" as defined by the Act" and committed Hendricks. *Id.* at 355-56.

87. *In re Hendricks*, 259 Kan. 246, 261 (1996), *rev'd*, *Kansas v. Hendricks*, 521 U.S. 346 (1997).

88. *Id.*

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

90. *Id.* at 356.

91. *Id.* at 357.

92. *Id.*

93. *See id.* at 358.

94. *Id.* (emphasis added).

inability to control his dangerousness, the Kansas [SVPA] sets forth *comparable criteria* and Hendricks' condition doubtless satisfies those criteria."⁹⁵ The Court determined that the definition of a mental abnormality in the Kansas SVPA "plainly suffices for due process purposes."⁹⁶

The Court then discussed the main issues of *Hendricks* and determined that, due to the fact that the Kansas SVPA is not punitive in nature, it cannot be found to violate the Double Jeopardy and Ex Post Facto Clauses.⁹⁷ The Court again upheld the constitutionality of sexual predator acts in *Seling v. Young*.⁹⁸ The Court held that "[a]n Act, found to be civil, cannot be deemed punitive 'as applied' to a single individual in violation of the Double Jeopardy and Ex Post Facto Clauses."⁹⁹

Although these cases have expanded the commitment powers of states, the United States Supreme Court began clarifying the boundaries of civil commitment in *Jackson v. Indiana*.¹⁰⁰ It stated that an individual could not be constitutionally committed for an indefinite period of time just because he or she was found not competent to stand trial.¹⁰¹ The Court held that "due process require[d] that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual [was] committed."¹⁰² Following *Jackson*, the Court further held in *O'Connor v. Donaldson*,¹⁰³ that a state may not commit an individual based on "mental illness alone," if he posed no harm to himself or to society.¹⁰⁴ The Court explained

95. *Id.* at 360 (emphasis added).

96. *Id.* The Court further held that Hendricks' pedophilia diagnosis qualified as a mental abnormality, and his "admitted lack of volitional control, coupled with a prediction of future dangerousness, adequately distinguish[ed] Hendricks from other dangerous persons who are perhaps more properly dealt with exclusively through criminal proceedings." *Id.*

97. *Id.* at 369. The Court first reasoned that the Kansas SVPA was not criminal in nature, since the legislature had no punitive intent when it created the Kansas SVPA; targeted a limited group of dangerous individuals; "provided strict procedural safeguards"; separated the committed predators from the general criminal prisoners; recommended treatment; and allowed release once it was proven that an acquittee was "no longer dangerous or mentally impaired." *Id.* at 368-69. Next, the Court articulated that since the Kansas SVPA was civil and did not constitute punishment, it could not be held to violate the Double Jeopardy Clause since it neither amounted to a "second prosecution" nor confined an individual to a second prison term. *Id.* at 369. Finally, because the Ex Post Facto Clause "'forbids the application of any new punitive measure to a crime already consummated,'" the Court explained that the Kansas SVPA could not violate the clause, as no punishment was imposed. *Id.* at 370 (quoting *Cal. Dept. of Corrs. v. Morales*, 514 U.S. 499, 505 (1995)).

98. 531 U.S. 250 (2001).

99. *Id.* at 267.

100. 406 U.S. 715 (1972).

101. *Id.* at 720.

102. *Id.* at 738. The Court further stated that an individual found incompetent to stand trial could not "be held more than the reasonable period of time" required to determine if he or she would be able to stand trial in the near future. *Id.*

103. 422 U.S. 563 (1975).

104. *Id.* at 575.

that “[m]ere public intolerance or animosity cannot constitutionally justify the deprivation of a person’s physical liberty.”¹⁰⁵

Additionally, in *Foucha v. Louisiana*,¹⁰⁶ the United States Supreme Court again tightened the constitutional limits of civil commitment; yet it reinforced the mentally ill and dangerousness requirements.¹⁰⁷ The Court found that a state may not continue to hold an insanity acquittee who was no longer mentally ill merely because the individual could not prove that he or she was no longer dangerous.¹⁰⁸ The Court clarified that “*Jones* established that insanity acquitees [could] be treated differently in some respects from those persons subject to civil commitment.”¹⁰⁹ However, because *Foucha* was no longer considered insane, he could not be classified as such.¹¹⁰ Nevertheless, the Court reinforced *Jones* and concluded that a state could involuntarily commit a mentally ill individual if it proved “‘by clear and convincing evidence that the individual [was] mentally ill and dangerous.’”¹¹¹

Finally, the United States Supreme Court in *Heller v. Doe*¹¹² again narrowed civil commitment powers.¹¹³ In *Heller*, the Court upheld a Kentucky state statute requiring proof beyond a reasonable doubt for involuntary civil commitment based on mental illness.¹¹⁴ Following in the line of *Addington*, the Court ruled that the higher standard for committing those with mental illnesses, rather than mental retardation, “tends to equalize the risks of an erroneous determination that the subject of a commitment proceeding has the condition in question.”¹¹⁵

105. *Id.*

106. 504 U.S. 71 (1992).

107. *See generally id.*

108. *Id.* at 86. *Foucha* involved a Louisiana statute that automatically committed an insanity acquittee unless he proved that he was not dangerous. *Id.* at 73. In *Foucha*’s case, although numerous doctors had found that he was no longer mentally ill, he remained confined since no doctor could certify that he was no longer a threat to society or himself. *Id.* at 75.

109. *Id.* at 85.

110. *Id.*

111. *Id.* at 80 (quoting *Jones v. United States*, 463 U.S. 354, 362 (1983)).

112. 509 U.S. 312 (1993).

113. *See generally id.*

114. *See id.* at 314, 322. The Court articulated that Kentucky’s clear and convincing evidence standard for the conviction of mentally retarded individuals was justified since the individual’s status made erroneous convictions less likely. *Id.* at 321-22. The higher beyond reasonable doubt standard required to commit those with mental illnesses was justified by a higher “risk of error” in determining an individual’s mental illness. *Id.* at 322.

115. *Id.* at 322.

B. *The History of the Kansas Sexually Violent Predator Act*

The Kansas SVPA¹¹⁶ was enacted in 1994 following a tragic murder in Pittsburg, Kansas.¹¹⁷ After serving ten years of a ten to twenty year sentence for the rape and aggravated sodomy of a female student at Pittsburg State University, Donald Ray Gideon was released from prison on November 5, 1992.¹¹⁸ Only nine months later, Gideon gave twenty-year-old Stephanie Schmidt a ride home from a bar and brutally raped, sodomized, and murdered her.¹¹⁹ Gideon pled guilty to kidnap, rape, sodomy, and murder and was sentenced to four consecutive forty-year sentences.¹²⁰

Following her murder, Stephanie Schmidt's parents, many Kansas legislators, and various other officials and citizens, formed the "Sexual Offender Task Force" and lobbied for the adoption of a civil commitment act like the Washington Community Protection Act of 1990.¹²¹ According to Representative Gary Haulmark's testimony to the Senate Judiciary Committee, "[t]he Sexual Predator Act would go after anyone convicted of, or charged with a sexually violent crime and who suffers from a mental abnormality or personality disorder."¹²² Additionally, Senator Bob Vancrum testified that "[t]he bill is narrowly tailored to focus on the small number of habitual sex offenders who, because of their psychological makeup, pose an immediate danger to the public as soon as they are released from prison."¹²³

Based on this targeted lobbying, former Kansas Governor Joan Finney signed Senate Bill 525 into law on May 9, 1994,¹²⁴ and the Kansas SVPA went into effect ten days later.¹²⁵ According to the Preamble to Kansas statute section 59-29a01, the Kansas SVPA was enacted

116. KAN. STAT. ANN. §§ 59-29a01 to -29a20 (1994 & Supp. 2002).

117. DesLauriers & Gardner, *supra* note 58, at 11-2. Nonetheless, this was not the first time a sexual predator statute had been proposed in Kansas. See KAN. LEGISLATIVE INFO. SYS., SENATE AND HOUSE ACTIONS REPORT 2-3 (1992) [hereinafter ACTION REPORT I]; KAN. LEGISLATIVE INFO. SYS., SENATE AND HOUSE ACTIONS REPORT 4 (1991) [hereinafter ACTION REPORT II]. However, these bills were withdrawn by the Ways and Means Committee and referred to the Judiciary on March 21, 1991, and then died in committee on May 26, 1992. See ACTION REPORT I, *supra*, at 2-3; ACTION REPORT II, *supra*, at 4. Nevertheless, two days after Stephanie Schmidt's body was found in southeast Kansas, legislators reintroduced similar legislation to the Senate and House. See DesLauriers & Gardner, *supra* note 58, at 11-2.

118. Greg Kuhl & Ann Spivak, *Parole Concerns Weren't Enough to Hold Gideon*, KAN. CITY STAR, July 31, 1993, at C1.

119. See DesLauriers & Gardner, *supra* note 58, at 11-2 to 11-3.

120. *Id.* at 11-3.

121. *Sexual Predator Act: Hearing on S.B. 525 Before the Senate Judiciary Comm.*, 1994 Leg., 75th Sess. 2-1 (Kan. 1994) (testimony of Rep. Gary Haulmark).

122. *Id.* Representative Haulmark testified that the Ad Hoc Sexual Offender Task Force "saw statistic after statistic which indicated these people will re-offend 50% to 90% of the time if allowed the opportunity." *Id.*

123. *Sexual Predator Act: Hearing on S.B. 525 Before the Senate Judiciary Comm.*, 1994 Leg., 75th Sess. 1-1 (Kan. 1994) (testimony of Sen. Bob VanCrum).

124. KAN. LEGISLATIVE INFO. SYS., SENATE AND HOUSE ACTIONS REPORT 64 (1994).

125. See DesLauriers & Gardner, *supra* note 58, at 11-3. Senate Bill 525 was passed by the House on a 101-23 vote and by the Senate on a 40-0 vote. KAN. LEGISLATIVE INFO. SYS., *supra* note 124, at 64.

because of the “special needs” and risk to society of certain “extremely dangerous” sexual predators who need confinement and treatment due to their likelihood of repeat offenses “if not treated for their mental abnormalit[ies] or personality disorder[s].”¹²⁶

Following the enactment of the Kansas SVPA, the constitutionality of the Kansas statute was questioned.¹²⁷ Subsequently, the United States Supreme Court finally had the opportunity to address the constitutionality of sexual predator laws in *Hendricks*.¹²⁸

Although *Hendricks* was the breakthrough case, *In re Hay*¹²⁹ allowed the Kansas Supreme Court to further define the constitutionality of the Kansas SVPA.¹³⁰ Despite Hay’s appeal that the Kansas SVPA was unconstitutional on various grounds, the court affirmed Hay’s civil commitment as a sexual predator due to his numerous sexual offenses and diagnosis of pedophilia as well as a personality disorder.¹³¹ Then, in *In re Lair*,¹³² the Kansas Court of Appeals affirmed Lair’s commitment as a sexual predator because he was diagnosed with pedophilia and an antisocial personality disorder, and he “was likely to repeat sexually violent offenses.”¹³³ Thus, prior to *Crane*, it seemed clear that the Kansas SVPA was constitutional with its two substantive requirements: a sexual offender suffering from a mental abnormality or personality disorder, and proof of future dangerousness.

IV. ANALYSIS

In *Kansas v. Crane*, the issue was whether the Kansas Supreme Court incorrectly applied *Hendricks* as requiring a showing of a sexually violent predator’s “total or complete lack of control” in order to satisfy substantive due process requirements.¹³⁴

A. Petitioner’s Arguments

The State of Kansas presented three main arguments for reversal of the Kansas Supreme Court’s holding in *Crane*.¹³⁵ First, the State contended that the Kansas Supreme Court incorrectly interpreted a

126. KAN. STAT. ANN. § 59-29a01 (1994 & Supp. 2002).

127. See generally *In re Hendricks*, 259 Kan. 246 (1996), *rev’d*, *Kansas v. Hendricks*, 521 U.S. 346 (1997).

128. See *supra* notes 84-97 and accompanying text.

129. 953 P.2d 666 (Kan. 1998).

130. See generally *id.*

131. *Id.* at 671, 680. The court held that, besides not violating the Double Jeopardy and Ex Post Facto Clauses, the Kansas SVPA violated neither substantive nor procedural due process or the guarantees of equal protection. *Id.* at 672-73, 680. Additionally, the court held that it was not “overly broad and vague” and did not constitute cruel and unusual punishment. *Id.*

132. 11 P.3d 517 (Kan. Ct. App. 2000).

133. *Id.* at 520.

134. *Kansas v. Crane*, 534 U.S. 407, 409, 411 (2002).

135. See Brief of Petitioner at 11-30, *Crane* (No. 00-957).

“cannot control” requirement in *Hendricks*, and that this new due process standard was not warranted.¹³⁶

The State asserted that the United States Supreme Court had traditionally “left the substantive aspects of state civil commitment statutes . . . to the states.”¹³⁷ Due to the uncertain medical nature of civil commitment standards, the State argued that deference to the states was only proper.¹³⁸ Additionally, the State asserted that a new substantive due process requirement of proof of an individual’s “lack of volitional control” was not created in *Hendricks*.¹³⁹ Instead, the State contended that the United States Supreme Court reiterated the two traditional substantive requirements: mental problems linked to proof of dangerousness.¹⁴⁰ The State stressed that the references to inability to control in *Hendricks* were due to the fact that Hendricks suffered from a volitional impairment.¹⁴¹

Furthermore, the State asserted that there was no medical or scientific basis for the Kansas Supreme Court’s holding that a state must prove a sex offender’s inability to control his sexual deviance.¹⁴² The State presented evidence that basically no individual, regardless of his or her mental illness, completely lacks self-control.¹⁴³ Moreover, the State asserted that “volitional control is a matter of degree that is impossible to measure or establish.”¹⁴⁴

In the State’s second main argument, it stressed that at most, the lack of control requirement should only be *some* volitional impairment.¹⁴⁵ The State contended that, although a requirement of *some* volitional impairment was neither “justified by current precedent nor by medical or scientific knowledge,” the requirement would at least pave the way to commitment of “dangerous sex offenders who suffer from significant personality disorders.”¹⁴⁶ Thirdly, the State declared that a “cannot control” requirement would drastically limit the number of mentally ill repeat offenders who could receive treatment from civil commitment by severely restricting the class of offenders.¹⁴⁷

136. *Id.* at 11.

137. *Id.* at 13.

138. *Id.* at 17.

139. *Id.*

140. *Id.*

141. *Id.* at 18. Furthermore, the State argued that “[s]ome personality disorders clearly justify involuntary civil commitment,” and the Kansas Supreme Court was wrong when it held that a personality disorder “can never satisfy substantive due process.” *Id.* at 20-21.

142. *Id.* at 25.

143. *Id.*

144. *Id.* at 26.

145. *Id.* at 27.

146. *Id.* at 28.

147. *Id.* at 28-29.

B. Respondent's Arguments

Crane argued that civil commitment without a volitional impairment requirement was unconstitutional since inability to control behavior was a “well established form of mental disability justifying involuntary civil commitment.”¹⁴⁸ Moreover, Crane asserted that a lack of control requirement was necessary to keep the Kansas SVPA free of a punitive effect.¹⁴⁹

Next, Crane stressed that “[a]n impairment standard of ‘likely to offend’ does not satisfy the Due Process Clause of the Fourteenth Amendment.”¹⁵⁰ Under this claim, he stated that a standard of “likely to offend” was not the same as a requirement of “inability to control behavior” since it was too “vague” and “imprecise.”¹⁵¹ Moreover, Crane asserted that the Kansas SVPA gave the State too much police power and functioned more like a method of deterrence.¹⁵² Finally, Crane contended that the Kansas SVPA was being used for retribution.¹⁵³ Crane avowed that the prosecutor improperly assured one of the victims that, if Crane did not serve a long sentence, the State would commit him under the Kansas SVPA.¹⁵⁴

C. Majority Opinion

In *Crane*, the majority held “that *Hendricks* set forth no requirement of a *total* or *complete* lack of control,”¹⁵⁵ however, “there must be proof of serious difficulty in controlling behavior.”¹⁵⁶ Although it found a total lack of control requirement unworkable, the Court affirmed that *Hendricks* required a “‘difficult, if not impossible’” standard.¹⁵⁷ The Court recognized a lack of clarity in the control standard

148. See Brief for Respondent at 8, *Crane* (No. 00-957). Thus, Crane argued that the Kansas Supreme Court correctly applied *Hendricks*. *Id.* at 14. Crane then cited many excerpts from *Hendricks*, which appeared to support his argument. See *id.* at 14-15. Crane cited excerpts such as: “[t]he pre-commitment requirement of a ‘mental abnormality’ or ‘personality disorder’ is consistent with the requirements of these other statutes that we have upheld in that it narrows the class of persons eligible for confinement to those who are unable to control their dangerousness.” *Id.* at 15.

149. *Id.* at 12.

150. *Id.* at 18.

151. *Id.* at 22.

152. *Id.* at 22-23.

153. *Id.* at 24.

154. See *id.* at 26-30. In its decision in *Crane*, the Kansas Supreme Court moderately focused on these actions of the prosecutor. See *In re Crane*, 7 P.3d 285, 286 (Kan. 2000), *vacated by Crane*, 534 U.S. 407. This suggested that the Court’s decision to create the “total lack of control” requirement was possibly due to the prosecutor’s misapplication of the Kansas SVPA.

155. *Crane*, 534 U.S. at 411.

156. *Id.* at 413.

157. *Id.* at 411 (quoting *Kansas v. Hendricks*, 521 U.S. 346, 358 (1997)).

established in *Hendricks*, but contributed that to the fact that volitional impairment must be determined case-by-case.¹⁵⁸

Additionally, the Court stressed that some lack of control requirement was necessary to maintain a separation between involuntary civil commitment and criminal confinement.¹⁵⁹ Moreover, it stated that a showing of inability to control criminal sexual activity was necessary to identify sex offenders with serious mental disorders.¹⁶⁰ Thus, the Court vacated the Kansas Supreme Court's judgment and remanded Crane's case for further proceedings.¹⁶¹

D. *Dissenting Opinion*

In his dissenting opinion, Justice Antonin Scalia, joined by Justice Clarence Thomas, asserted that the majority's holding in *Crane* made it impossible for the Kansas SVPA to be applied as written.¹⁶² Justice Scalia stated that only five years ago the Court upheld the Kansas SVPA and its requirements.¹⁶³ First, Justice Scalia asserted that the State must prove that the offender has been convicted of a sexual offense and "is suffering from a mental abnormality or personality disorder."¹⁶⁴ Secondly, the State must prove "that this condition renders him likely to commit future acts of sexual violence."¹⁶⁵ Justice Scalia opined that these two requirements were within a jury's ability to decide; however, the new requirement, that the offender lacks some control, made it impossible to instruct the jury, as the Court did not provide a defined degree of inability to control.¹⁶⁶

Additionally, Justice Scalia contended that the Kansas SVPA's requirement of a "causal connection" between a mental abnormality or personality disorder and a likelihood of repeat offenses essentially met the "difficult if not impossible" to control behavior requirement.¹⁶⁷ Furthermore, he stressed that the majority's holding was in sharp contrast to the tradition of leaving the "task of defining terms of a medical nature that have legal significance" to legislatures.¹⁶⁸

158. *See id.* at 413-14. Finally, the Court agreed that *Hendricks* was limited to discussion of volitional impairments, and it asserted that it would not consider emotional impairments in *Crane* either. *Id.* at 415.

159. *Id.* at 412.

160. *See id.* at 412-13.

161. *Id.* at 415. Following the remand, Crane's attorney filed a Motion to Dismiss with the Johnson County District Court. *See* Motion to Dismiss Involuntary Commitment Proceeding and Discharge Respondent, *In re Crane* (No. 97C16409). The Motion to Dismiss was granted on May 9, 2002. *See* Journal Entry of Dismissal, *In re Crane* (No. 97CV16409).

162. *Crane*, 534 U.S. at 415 (Scalia, J., dissenting).

163. *Id.* at 415-16 (Scalia, J., dissenting).

164. *Id.* at 422-23 (Scalia, J., dissenting).

165. *Id.* at 423 (Scalia, J., dissenting).

166. *Id.* (Scalia, J., dissenting).

167. *Id.* at 419 (Scalia, J., dissenting).

168. *Id.* at 420 (Scalia, J., dissenting) (quoting *Kansas v. Hendricks*, 521 U.S. 346, 359 (1997)).

Finally, Justice Scalia contended that “[t]he narrowest holding of *Hendricks* affirmed the constitutionality of commitment on the basis of the jury charge given in that case (to wit, the language of the SVPA); and since that charge did not require a finding of volitional impairment, neither does the Constitution.”¹⁶⁹

E. Commentary

In *Kansas v. Crane*, the United States Supreme Court held that a state must show “proof of serious difficulty in controlling behavior” in order to commit an individual under the Kansas SVPA.¹⁷⁰ In doing so, the Court seemingly misinterpreted case precedent and injected ambiguity into the Kansas SVPA.

The Kansas SVPA was enacted to stop the reoccurrence of sexual crimes committed by individuals with mental abnormalities or personality disorders who are likely to reoffend.¹⁷¹ Moreover, it was designed to supply confinement and treatment for individuals who commit sexual crimes, but are not deterred by prison sentences.¹⁷² The United States Supreme Court’s decision in *Crane*, however, has drastically changed the applicability of sexual predator statutes. In *Crane*, the Court had the opportunity to resolve any ambiguity in *Hendricks*; yet, the Court left more questions unanswered and caused many states to doubt the ability to constitutionally apply sexual predator statutes as written.

1. Misinterpretation of Case Precedent

The United States Supreme Court held that the new difficulty in controlling behavior requirement established in *Crane* was derived from *Kansas v. Hendricks*.¹⁷³ However, one could argue the Court did not create a new substantive requirement in *Hendricks*.¹⁷⁴ Instead, the *Hendricks* Court restated the proposition, established by substantial case precedent, that the two requirements for a sexual predator act to be constitutional are that the offender has been diagnosed with a mental abnormality or personality disorder and likely poses a threat of future harm to the public.¹⁷⁵

169. *Id.* at 422 (Scalia, J., dissenting). Justice Scalia closed the opinion by stating that “[t]he State of Kansas sought certiorari, asking nothing more than reaffirmation of our 5-year-old opinion – only to be told that what we said then we now unsay. There is an obvious lesson here for state supreme courts that do not agree with our jurisprudence: ignoring it is worth a try.” *Id.* at 424 (Scalia, J., dissenting).

170. *Id.* at 413.

171. KAN. STAT. ANN. § 59-29a01 (1994 & Supp. 2002).

172. *Id.*

173. See *Crane*, 534 U.S. at 412.

174. Brief of Petitioner at 17, *Crane* (No. 00-957).

175. *Kansas v. Hendricks*, 521 U.S. 346, 371 (1997).

Although the *Hendricks* Court extensively mentioned volitional impairment and inability to control behavior, it did not state that this was a requirement for every case.¹⁷⁶ Rather, the Court asserted that Hendricks' *admitted* lack of control combined with his threat of future dangerousness "adequately distinguish[ed]" him from other offenders more effectively controlled through criminal proceedings.¹⁷⁷ Thus, the Court's multiple references to an inability to control behavior were due to the fact that Hendricks suffered from a volitional impairment.¹⁷⁸ When the Court made volitional impairment references, they were descriptive rather than prescriptive.¹⁷⁹

Not one of the Justices in *Hendricks* indicated that proof of an inability to control dangerousness was necessary for the Kansas SVPA to satisfy substantive due process requirements.¹⁸⁰ Rather, the *Hendricks* Court held that the statute's "definition of 'mental abnormality' satisfie[d] 'substantive' due process requirements."¹⁸¹ In fact, Hendricks' statements about his inability to "control the urge" to molest children" and his diagnosis as a pedophile, were the only determinations made at trial of an inability to control sexual behavior.¹⁸² Thus, since the jury was not asked to determine whether Hendricks lacked control of his sexual behavior, the Court was not provided any legal opportunity to discuss this substantive issue.¹⁸³ Therefore, the Court could not have determined in *Hendricks* that proof of some lack of control was required for substantive due process since it was not an issue before the Court.¹⁸⁴

Hendricks reinforced the Court's goal that civil commitment be based on something more than mere dangerousness.¹⁸⁵ However, it stated that, as long as dangerousness was linked to a mental abnormality or personality disorder, the substantive due process requirements were satisfied because the connection between the two almost always developed from the predators' lack of control.¹⁸⁶ Yet, the *Hendricks* Court did not mean that inability to control behavior must be

176. Brief of Petitioner at 18, *Crane* (No. 00-957).

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

178. See Tr. of Oral Argument, Oct. 30, 2001, at *2, *Crane* (00-957), 2001 U.S. TRANS LEXIS 58.

179. See *id.*

180. Brief of Petitioner at 18, *Crane* (No. 00-957).

181. *Hendricks*, 521 U.S. at 356.

182. *Id.* at 360.

183. *Crane*, 534 U.S. at 421 (Scalia, J., dissenting). As Justice Scalia stated, "[i]t is true that we repeatedly referred to Hendricks' 'volitional' problems — because that was evidently the sort of mental abnormality that he had. But we nowhere accorded any legal significance to that fact — as we could not have done, since it was not a fact that the jury had been asked to determine." *Id.*

184. *Id.*

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

186. See *id.*; see also *Crane*, 534 U.S. at 419 (Scalia, J., dissenting).

separately proven.¹⁸⁷ As the Court stated in *Hendricks*, “[t]he statute thus requires proof of more than a mere predisposition to violence; rather, it requires evidence of past sexually violent behavior and a present mental condition that creates a likelihood of such conduct in the future if the person is not incapacitated.”¹⁸⁸ This describes the statute that the Court upheld as constitutional in *Hendricks*.

Prior to *Crane*, many courts, including ones in Washington, Illinois, Arizona, and California applied this interpretation of *Hendricks*.¹⁸⁹ For example, in *In re Gordon*,¹⁹⁰ the Washington Appellate Court held that Washington’s sexual predator statute satisfied *Hendricks* since it established a “causal link . . . between an alleged sexual predator’s mental abnormality or personality disorder and the likelihood that he or she will engage in predatory acts of sexual violence in the future.”¹⁹¹ Additionally, in *In re Varner*,¹⁹² the Illinois Appellate Court held that the Illinois sexual predator act was consistent with *Hendricks* since it required proof beyond a reasonable doubt that a sexual predator suffered “from a mental disorder that creates a substantial probability that he will engage in acts of sexual violence,” thus making the predator dangerous.¹⁹³ Similarly in *State v. Ehrlich*,¹⁹⁴ the Arizona Supreme Court reasoned that

[n]o doubt, dangerousness caused by a mental illness or abnormality often will involve a volitional impairment, and evidence of that impairment may be relevant. Commitment statutes also envision, however, that other impairments may be involved.

. . . .

For all those reasons, we reject the Court of Appeals’ interpretation of *Hendricks* as requiring a separate showing of volitional impairment. We conclude that the principles of substantive due process require that civil commitment statutes, including the SVP act, narrow the class of persons eligible for commitment by linking a finding of dangerousness to one of mental illness or abnormality, not that the causal link be volitional in nature.¹⁹⁵

Finally, the California Supreme Court held in *People v. Hatfield*¹⁹⁶ that “[t]he essence of the due process requirement announced in *Hendricks* is a demonstrated, diagnosed impairment that makes the person likely to engage in dangerous sexually violent be-

187. See *Crane*, 534 U.S. at 419 (Scalia, J., dissenting).

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

189. See Brief of Petitioner at 23, *Crane* (No. 00-957).

190. 10 P.3d 500 (Wash. App. Ct. 2000).

191. *Id.* at 503; see also Brief of Petitioner at 24, *Crane* (No. 00-957).

192. 734 N.E.2d 226 (Ill. App. Ct. 2000), *vacated by* Varner v. Illinois, 123 S. Ct. 69 (2002) (*United States Reports* pagination not available at time of publication).

193. *Id.* at 236; see also Brief of Petitioner at 24, *Crane* (No. 00-957).

194. 26 P.3d 481 (Ariz. 2001), *overruled by* *In re* Detention of Wilbur W., 2002 Ariz. App. LEXIS 137 (2002).

195. *Ehrlich*, 26 P.3d at 487.

196. 80 Cal. Rptr. 2d 268 (1998).

havior in the future.”¹⁹⁷ Consequently, this court reasoned that the justification of civil commitment was based on future dangerousness, rather than lack of control.¹⁹⁸

Although these cases were obviously not binding on the United States Supreme Court, *In re Gordon*, *In re Varner*, *Ehrlich*, and *Hatfield* all suggest that, without guidance, other courts did not interpret a lack of control requirement in *Hendricks*. Thus, it would not have been outlandish for the United States Supreme Court to have held in *Crane* that the volitional impairment discussion in *Hendricks* was merely descriptive of Hendricks’ impairment.

Therefore, the essence of the decision in *Hendricks* is that the Kansas SVPA’s “definition of a ‘mental abnormality’ satisfies ‘substantive’ due process requirements.”¹⁹⁹ *Hendricks* does not support the “inability to control” requirement that the Court interpreted in *Crane*.²⁰⁰ The Kansas Supreme Court itself stated that, “Kansas’ statutory scheme for commitment of sexually violent predators does not expressly prohibit confinement absent a finding of uncontrollable dangerousness. In fact, a fair reading of the statute gives the opposite impression.”²⁰¹ Thus, one could argue that the United States Supreme Court created the new substantive due process requirement of “serious difficulty in controlling behavior”²⁰² through misinterpretation of its own case precedent.

In addition to misinterpreting *Hendricks*, the Court seemingly disregarded its tradition of taking “a deferential approach to substantive due process claims in the mental health context.”²⁰³ Properly enacted state statutes are presumed constitutional.²⁰⁴ Therefore, the basis of substantive due process is that deference should be given to legislatures’ determinations of state statutes as long as they are reasonable.²⁰⁵

The challenge to the Kansas SVPA in *Crane* was one of substantive due process.²⁰⁶ The substantive issues in the area of civil commitment have traditionally been left to state legislatures to determine,

197. *Id.* at 282; Brief of Petitioner at 24, *Crane* (No. 00-957).

198. *Hatfield*, 80 Cal. Rptr. 2d at 282; *see also* Brief of Petitioner at 24, *Crane* (No. 00-957).

199. *See* Kansas v. Hendricks, 521 U.S. 346, 356 (1997).

200. *See* Brief of Petitioner at 23, *Crane* (No. 00-957); *see also* Brief of the States of Illinois, Alabama, Arizona, California, Delaware, Florida, Iowa, Maryland, Massachusetts, Mississippi, Missouri, Nebraska, New Jersey, North Dakota, Oklahoma, Pennsylvania, South Carolina, Washington and Wisconsin as Amici Curiae in Support of Petitioner at 1, *Crane* (No. 00-957) [hereinafter Brief of the States as Amici Curiae in Support of Petitioner].

201. *In re Crane*, 7 P.3d 285, 289 (Kan. 2000), *vacated by Crane*, 534 U.S. 407.

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

203. Brief of Petitioner at 11, *Crane* (No. 00-957).

204. *Id.* at 12 (citing *Heller v. Doe*, 509 U.S. 312, 319 (1993)).

205. *Jones v. United States*, 463 U.S. 354, 365 (1983); *see also* Brief of Petitioner at 8, *Crane* (No. 00-957).

206. Brief of Petitioner at 13, *Crane* (No. 00-957).

“with little federal constitutional limitation.”²⁰⁷ Therefore, the Court has traditionally only reviewed state legislative decisions for reasonableness, especially in areas based on various medical and scientific issues, such as civil commitment.²⁰⁸ Furthermore, “this Court has *never* applied strict scrutiny to the substance of state laws involving involuntary confinement of the mentally ill.”²⁰⁹

The United States Supreme Court has continually upheld state statutes that contained two requirements for civil commitment: a mental illness, and threat of harm.²¹⁰ In *O'Connor*, the Court did clarify the need for dangerousness since “mental illness alone” could not justify commitment.²¹¹ Since then, however, the Court has continually upheld these as the two substantive due process requirements for civil commitment.²¹²

Moreover, the Court has traditionally given the states broad power to commit those who suffer from mental illnesses and are considered dangerous.²¹³ In *Jones*, the Court stated that “[d]ue process is flexible and calls for such procedural protections as the particular situation demands.”²¹⁴ Thus, “courts should pay particular deference to reasonable legislative judgments.”²¹⁵ Similarly, the *Addington* Court reiterated that the basic purpose of a state’s power to civilly commit was to provide assistance to those unable to care for themselves as well as to protect society from those who pose a threat.²¹⁶ Even in *Hendricks*, the Court deferred to the Kansas legislature’s decisions regarding what is required to civilly commit Kansas’ sexual offenders.²¹⁷

207. *Id.*

208. *Id.* at 14; *see, e.g.*, *Kansas v. Hendricks*, 521 U.S. 346 (1997); *Addington v. Texas*, 441 U.S. 418 (1979); *O'Connor v. Donaldson*, 422 U.S. 563 (1975); *Jackson v. Indiana*, 406 U.S. 715 (1972). There are various scientific and medical issues that arise in the area of civil commitment, such as defining dangerousness, the likelihood that the predator will reoffend, and from what mental illness the predator suffers. *See* Brief of Petitioner at 14, *Crane* (00-957).

209. *Foucha v. Louisiana*, 504 U.S. 71, 119 (1992) (Thomas, J., dissenting); *see also* Brief of Petitioner at 13, *Crane* (No. 00-957). Thus, since neither sexual predators nor the arena of civil commitment have ever been held to be a suspect class, and therefore not analyzed under strict scrutiny, the Court should have upheld the Kansas SVPA as long as there was any rational basis for the statute.

210. Reply Brief at 1, *Crane* (No. 00-957); *see, e.g.*, *Seling v. Young*, 531 U.S. 250 (2001); *Hendricks*, 521 U.S. 346; *Foucha*, 504 U.S. 71; *Addington*, 441 U.S. 418; *O'Connor*, 422 U.S. 563; *Humphrey v. Cady*, 405 U.S. 504 (1972).

211. *O'Connor*, 422 U.S. at 575.

212. *See* Reply Brief at 1, *Crane* (No. 00-957); *see, e.g.*, *Young*, 531 U.S. 250; *Hendricks*, 521 U.S. 346; *Foucha*, 504 U.S. 71; *Addington*, 441 U.S. 418; *O'Connor*, 422 U.S. 563; *Humphrey*, 405 U.S. 504.

213. *See, e.g.*, *Addington*, 441 U.S. at 426.

214. *Jones v. United States*, 463 U.S. 354, 367-68 (1983) (quoting *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972)).

215. *Id.* at 365.

216. *Addington*, 441 U.S. at 426.

217. *See generally Hendricks*, 521 U.S. 346.

Furthermore, the United States Supreme Court has traditionally allowed state legislatures to define medical terms in state statutes.²¹⁸ In both *Hendricks* and *Crane*, the Court wrote that states should “retain considerable leeway in defining the mental abnormalities and personality disorders that make an individual eligible for commitment.”²¹⁹ Additionally, in *Hendricks* the Court further stated that “[a]s we have explained regarding 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.’”²²⁰

However, the *Crane* Court seemingly did just that when it went beyond the Kansas legislature’s definition of a mental illness and added a third substantive requirement of “serious difficulty in controlling behavior.”²²¹ Despite rich precedent supporting deference to state legislatures, the *Crane* Court took the control to define the medical terms in state statutes away from legislatures.

There was no lack of control requirement in the Kansas SVPA.²²² Moreover, there was no legislative intent for a lack of control requirement to be included in that statute.²²³ Therefore, the Court seemingly overstepped its power by defining the medical nomenclature of a state statute. As Justice Scalia wrote,

[t]he notion that the Constitution requires in every case a finding of “difficulty if not impossibility” of control does not fit comfortably with the broader holding of *Hendricks*, which was that “we have never required state legislatures to adopt any particular nomenclature in drafting civil commitment statutes. Rather, we have traditionally left to legislatures the task of defining terms of a medical nature that have legal significance.”²²⁴

Due to the variations in legitimate medical and scientific expert opinions, the Court has not generally required all of the states to follow a single civil commitment structure.²²⁵ Instead, the Court has upheld state statutes “[as] long as there is a legitimate scientific and medical basis for the substantive requirements of a state’s civil commitment scheme.”²²⁶ However, the Court chose to not follow this long-standing tradition in *Crane* and instead created a new substantive

218. Brief of Petitioner at 12, *Kansas v. Crane*, 534 U.S. 407 (2002) (No. 00-957) (citing *Hendricks*, 521 U.S. at 359).

219. *Crane*, 534 U.S. at 413 (quoting *Hendricks*, 521 U.S. at 359).

220. *Hendricks*, 521 U.S. at 360 (quoting *Jones*, 463 U.S. at 370).

221. See *Crane*, 534 U.S. at 413.

222. See KAN. STAT. ANN. §§ 59-29a01 to -29a20 (1994 & Supp. 2002).

223. See *id.* § 59-29a01. The Preamble clearly states that the legislature’s intent was to commit individuals “who have a mental abnormality or personality disorder and who are likely to engage in repeat acts of sexual violence if not treated for their mental abnormality or personality disorder.” *Id.*

224. *Crane*, 534 U.S. at 420 (Scalia, J., dissenting).

225. See Brief of Petitioner at 13-17, *Crane* (No. 00-957).

226. *Id.* at 17.

due process “lack of control” requirement for all sexual predator statutes. By not deferring to state legislatures in this area of law, the Court essentially imposed “a single civil commitment system on all of the States as a matter of constitutional law.”²²⁷

2. Ambiguities and Unanswered Questions in the *Crane* Opinion

Three major ambiguities have surfaced in light of the *Crane* decision. These ambiguities are the standard’s lack of clarification, uncertainty of application, and proving the standard.

First, the United States Supreme Court agreed with the State of Kansas that a total lack of control requirement would make it far too difficult to successfully commit sexually violent predators.²²⁸ Yet, the Court felt that a showing of some lack of control was still necessary to separate those with mental abnormalities and personality disorders from the general prison population.²²⁹ However, the Court provided the states with little direction as to what satisfied the “serious difficulty in controlling behavior” requirement, thus leaving the states in utter confusion and almost guaranteeing another debate over this issue.²³⁰

The lack of control standard articulated in *Crane* is quite vague.²³¹ The Court wrote that the lack of control requirement would not have to be demonstrated by “mathematical precision” due to the “ever-advancing science [of psychiatry], whose distinctions do not seek precisely to mirror those of the law.”²³² However, there “must be proof of serious difficulty in controlling behavior . . . viewed in light of such features of the case as the nature of the psychiatric diagnosis, and the severity of the mental abnormality itself.”²³³

This standard seems anything but clear. Critics of *Crane* contend that the lack of control standard is “impractical and unworkable.”²³⁴ The standard does not provide courts with the legal constructs necessary for establishing what level of inability to control behavior is required to commit a sexual predator.²³⁵ In fact, this lack of guidance may make it quite difficult for states to charge their juries.²³⁶

227. *Id.*

228. *See Crane*, 534 U.S. at 411.

229. *See id.* at 412.

230. *See* Hamilton, *supra* note 58, at 502.

231. *Id.* at 498.

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

233. *Id.*

234. Hamilton, *supra* note 58, at 501.

235. *Id.* at 501-02.

236. *See Crane*, 534 U.S. at 423 (Scalia, J., dissenting). As Justice Scalia stated in his dissent: [t]oday’s opinion says that the Constitution requires the addition of a third finding: [] that the subject suffers from an inability to control behavior – not utter inability . . . not even inability in a particular constant degree, but rather inability in a degree that will

According to Georgia Smith Hamilton, “[w]hile mental health determinations such as insanity and competency employ objective criteria such as knowing, understanding, and communicating, volitional standards provide no such foundations upon which fact-finders can base their decisions.”²³⁷ Thus, with no neutral benchmark, triers-of-fact will be forced to determine whether an offender lacks enough control to be committed, while provided with very little assistance.²³⁸ In an area as controversial as involuntary civil commitment, juries should be equipped with as much direction as possible. The *Crane* standard fails to provide that direction. Rather, its ambiguity and vagueness further complicate the matter.

The Court attempted to justify its vagueness when it claimed to provide deference to the states by not setting a bright-line standard.²³⁹ The Court explained that it was trying to offer “constitutional guidance” so that distinctions could be made as “specific circumstances require.”²⁴⁰ However, it is difficult to understand why the Court chose to ignore an established tradition of deferring to the legislatures without providing clarifications on this new standard.

Secondly, according to the Kansas SVPA, a sexual predator must suffer from a “mental abnormality or personality disorder.”²⁴¹ A mental abnormality consists of either an “emotional *or* volitional” impairment.²⁴² In *Hendricks*, the Court only dealt with volitional impairments since Hendricks’ mental abnormality was pedophilia.²⁴³ On the other hand, Crane only suffered from a personality disorder and exhibitionism, and therefore that is the only impairment that the Court clearly established as requiring an inability to control.²⁴⁴ Consequently, the Court stated that it was not going to answer the question of what was required to commit an individual with an emotional impairment since *Crane* did not suffer from one.²⁴⁵ Unfortunately, the Court did not specifically limit its decision in *Crane* to personality disorders.²⁴⁶ Thus, the substantive requirements to commit an individual with an emotional impairment are uncertain.²⁴⁷

vary “in light of such features of the case as the nature of the psychiatric diagnosis, and the severity of the mental abnormality itself.”

Id. Justice Scalia also criticized the Court for giving trial courts “*not a clue* as to how they are supposed to charge the jury!” *Id.* He also opined that the majority left “the law in such a state of utter indeterminacy.” *Id.* at 424.

237. Hamilton, *supra* note 58, at 502.

238. *See id.* at 503.

239. *See Crane*, 534 U.S. at 413; *see also* Hamilton, *supra* note 58, at 502.

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

241. KAN. STAT. ANN. § 59-29a01 (1994 & Supp. 2002).

242. *Id.* § 59-29a02(b) (emphasis added).

243. *See Kansas v. Hendricks*, 521 U.S. 346, 355 (1997).

244. *See Crane*, 534 U.S. at 415.

245. *Id.*

246. *See id.* at 412-13.

247. *See* Hamilton, *supra* note 58, at 500-01.

A plain reading of the statute supports the conclusion that proof of “some lack of control” should not be required when an individual is suffering from an emotional impairment.²⁴⁸ The Kansas SVPA specifically states that a mental abnormality is either an “emotional *or* volitional” impairment.²⁴⁹ A volitional impairment is an impairment of one’s self-control.²⁵⁰ Therefore, the structure of the statute — the juxtaposition of “emotional” and “volitional”²⁵¹ — suggests that the legislature’s intent was *not* that an individual suffering from an emotional impairment must lack his or her ability to control sexual behavior. In fact, the juxtaposition suggests quite the opposite. As the State of Kansas asserted at oral argument, if a lack of control standard was required, the Kansas Legislature must strike emotional impairments from its statute, as it is no longer valid.²⁵²

However, due to the holding in *Crane*, it appears that states must now prove that an individual with an emotional impairment also suffers from a volitional impairment, since *Crane* appears to establish a new substantive requirement for the civil commitment of all sexual predators regardless of their mental illness.²⁵³ By leaving this question unanswered in *Crane*, the Court has left open whether “the man who has a will of steel, but who delusionally believes that every woman he meets is inviting crude sexual advances” can be civilly committed under a sexually violent predator statute.²⁵⁴ Critics argue that predators with emotional impairments pose an equivalent threat to society.²⁵⁵ Therefore, “their exclusion [from sexual predator acts] is unfounded.”²⁵⁶

The final ambiguity created by the *Crane* majority is that the Court did not establish how the lack of control requirement is to be proven.²⁵⁷ The Court took a case specific factor from *Hendricks* and applied it to all sexual predators.²⁵⁸ The only proof that *Hendricks* lacked the ability to control his sexual behavior was that he had a volitional impairment and stated that it was impossible for him to “‘control [his] urge’ to molest children.”²⁵⁹ This begs the question of

248. KAN. STAT. ANN. § 59-29a02(b) (1994 & Supp. 2002).

249. *Id.* (emphasis added).

250. BLACK’S LAW DICTIONARY 112-13 (2d pocket ed. 2001).

251. See KAN. STAT. ANN. § 59-29a02(b).

252. Tr. of Oral Argument, Oct. 30, 2001, at *23, *Kansas v. Crane*, 534 U.S. 407 (2002) (00-957), 2001 U.S. TRANS LEXIS 58.

253. Hamilton, *supra* note 58, at 500-01.

254. *Crane*, 534 U.S. at 422 (Scalia, J., dissenting). Contrasting emotional and volitional impairments is not unique to the Kansas SVPA. Brief of the States as Amici Curiae in Support of Petitioner at 7, *Crane* (No. 00-957). In fact the sexual predator statutes in Florida, Washington, Massachusetts, and New Jersey have the same juxtaposition. *Id.*

255. Hamilton, *supra* note 58, at 501.

256. *Id.*

257. See *Crane*, 534 U.S. at 423 (Scalia, J., dissenting).

258. See *supra* notes 173-202 and accompanying text.

259. *Kansas v. Hendricks*, 521 U.S. 346, 355 (1997).

whether an offender's statement that he cannot control himself is enough on its own to satisfy the lack of control requirement when the offender does not suffer from a volitional impairment.

Proving the cannot control standard is not even clear to doctors, let alone lawyers.²⁶⁰ According to the Association for the Treatment of Sexual Abusers, "[b]ecause free will is an article of faith, rather than a concept that can be explained in medical terms, it is impossible for psychiatrists to determine whether a mental impairment has affected the defendant's capacity for voluntary choice, or caused him to commit the particular act in question."²⁶¹ Thus, psychiatrists have to rely on an individual's determination of his ability to control his own behavior.²⁶²

With the cannot control requirement, the Court has basically put the offender in control of his or her ability to be committed.²⁶³ The Court completely overlooked this factor in *Crane* and provided no guidance to lower courts. Therefore, this issue will most likely resurface when courts are faced with psychiatrists' inability to diagnose difficulty in controlling behavior and the offenders being coached to say that they can control their actions.²⁶⁴ Conversely, with this standard, a person already suffering from a mental disability could seemingly be convicted solely upon his own unwitting statements. This could not have been the Court's intention.

Thus, courts are devoid of a clear definition of the inability to control standard. Additionally, courts are left to wonder whether individuals with emotional impairments can even be committed since, by statutory definition, they do not suffer from a volitional impairment.²⁶⁵ Finally, the Court gave no guidance on how to prove that a predator lacks the requisite control. Consequently, because of these ambiguities, future courts facing similar issues will have no idea where to turn.

3. Aftermath of *Kansas v. Crane*

The ambiguity of *Crane* will arise again. A more articulate standard of what qualifies as "some lack of control" will likely be derived

260. Brief for the Association for the Treatment of Sexual Abusers as Amicus Curiae in Support of Petitioner at 6, *Crane* (No. 00-957) (citing *Foucha v. Louisiana*, 504 U.S. 71, 96 (1992) (Kennedy, J., dissenting)).

261. *Id.* at 5.

262. Tr. of Oral Argument, Oct. 30, 2001, at *5, *Crane*, (00-957), 2001 U.S. TRANS LEXIS 58.

263. *See id.*

264. Hamilton, *supra* note 58, at 503.

265. *See* Jacob Maskovich, Case Note, *Kansas v. Crane: Its Effects on State v. Ehrlich and Arizona's Sexually Violent Persons Statute*, 43 ARIZ. L. REV. 1007, 1014 (2001) (stating that the Arizona Supreme Court used the emotional impairment ambiguity to hold that proof of "involuntariness" was not constitutionally required).

through case law. Once a case of emotional impairment presents itself to the United States Supreme Court, it will be forced to further clarify the application of *Hendricks* and *Crane*. The method for proving lack of control will develop through trial and error. However, the effect of *Crane* on commitment rates; the similarity between the new lack of control requirement and the criticized irresistible impulse test; and the message *Crane* sends to lower courts are additional concerns in the aftermath of *Crane*.²⁶⁶

Crane will likely have an effect on the commitment rates of sexual predators. There is a reason that those opposed to civil commitment argue that a “lack of control” standard is necessary – it makes it almost impossible to commit an individual.²⁶⁷

Many argue that a statute with a lack of control requirement is impossible to apply.²⁶⁸ The State of Kansas argued that “the reason those opposed to sex offender civil commitment laws push for a ‘cannot control’ standard is that virtually all diagnoses in the DSM-IV²⁶⁹ would fail to satisfy such a test, effectively eviscerating the laws.”²⁷⁰ Regardless of the type or severity of mental disorder, most individuals have control of their actions some, if not most, of the time.²⁷¹ As the State of Kansas argued, even sexual predators such as Jeffrey Dahmer and Ted Bundy maintained their ability to control their behavior at times.²⁷² In fact, both men were “quite cunning and calculating, and . . . managed to avoid detection and prosecution for some time.”²⁷³

The lack of control standard is also unnecessary, and even redundant, since the causal connection between a mental abnormality and future dangerousness meets the objective of narrowing the class to those with difficulty controlling their behavior.²⁷⁴ Thus, the requirement does not provide the protection envisioned by the Court, is hard to prove, and will most likely have a substantial effect on commitment rates.²⁷⁵

Psychologists can determine a patient’s sexual urges by talking with them.²⁷⁶ These “self reports are reasonably reliable” in formulat-

266. See *infra* notes 267-99 and accompanying text.

267. Brief of Petitioner at 25, *Crane* (No. 00-957).

268. See Hamilton, *supra* note 58, at 502.

269. The DSM-IV is a manual used to profile psychological disorders. AM. PSYCHIATRIC ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (4th ed. 1994).

270. Brief of Petitioner at 25, *Crane* (No. 00-957).

271. *Id.*

272. *Id.*

273. *Id.*

274. See *Crane*, 534 U.S. at 419 (Scalia, J. dissenting).

275. See Brief of the States as Amici Curiae in Support of Petitioner at 1, *Crane* (No. 00-957).

276. Brief for the Association for the Treatment of Sexual Abusers as Amicus Curiae in Support of Petitioner at 6, *Crane* (No. 00-957).

ing treatments.²⁷⁷ Moreover, personality testing can “measure, to some degree, the extent to which a patient can control his impulses.”²⁷⁸ However, a professional “cannot use either of those tests to form a conclusion whether a patient ‘cannot control’ his future behavior.”²⁷⁹

The courts are therefore left with an undefined requirement that is very difficult, if not impossible, to prove because testing cannot provide the evidence on behavior control. Consequently, sexual predators are less likely to be committed. Only time will tell what the impact on commitment rates for sexual offenders will ultimately be.

Next, in the aftermath of *Crane*, many have compared the new cannot control requirement to the “widely criticized irresistible impulse test.”²⁸⁰ The irresistible impulse test is a “theory of insanity”²⁸¹ and “test for mental illness”²⁸² based upon an individual’s inability to resist his or her impulses.²⁸³ Due to its impracticality and unworkable manner, most jurisdictions and medical professions have rejected the irresistible impulse standard.²⁸⁴ According to the Association for the Treatment of Sexual Abusers, *Crane’s* “cannot control” standard poses the same problems.²⁸⁵

The traditional problem with the irresistible impulse test is that many feel that impulses are simply desires.²⁸⁶ Therefore, when an individual satisfies those desires, he or she is doing so intentionally, even if “[t]he agent may have a strongly felt need to satisfy the impulse.”²⁸⁷ Additionally, the Association wrote that “the line between an irresistible impulse and an impulse not resisted is probably no sharper than that between twilight and dusk.”²⁸⁸

Thus, the difficulty with the irresistible impulse test, and hence the cannot control requirement, is that it’s difficult for psychologists to prove and hard to apply in the legal context.²⁸⁹ According to the Association for the Treatment of Sexual Abusers, “it is simply impossible to tell the difference between an impulse that is ‘irresistible’ and one

277. *Id.*

278. *Id.*

279. *Id.* at 7.

280. *See id.*; see also Hamilton, *supra* note 58, at 502; Stephen J. Morse, *Act & Crime: Acts, Choices & Coercion: Culpability and Control*, 142 U. PA. L. REV. 1587, 1599-1602 (1994).

281. Brief of Petitioner at 26, *Crane* (No. 00-957).

282. Brief for the Association for the Treatment of Sexual Abusers as Amicus Curiae in Support of Petitioner at 4, *Crane* (No. 00-957).

283. *See id.*

284. *Id.*

285. *Id.*

286. Morse, *supra* note 280, at 1600.

287. *Id.*

288. Brief for the Association for the Treatment of Sexual Abusers as Amicus Curiae in Support of Petitioner at 5, *Crane* (No. 00-957).

289. *See id.* at 4.

that simply is not resisted enough.”²⁹⁰ Therefore, the law is forced to “look beyond current knowledge for assistance in [determining whether a predator cannot control his behavior]; any such inquiry would have to focus on the defendant’s desires, thoughts, and feelings, which are, needless to say, inaccessible by any currently known measuring techniques.”²⁹¹ This has led many psychiatrists to conclude that volitional testimony causes more confusion for jurors than other “psychiatric testimony relevant to a defendant’s appreciation or understanding” because there are no reliable methods of measuring a predator’s ability to control his actions.²⁹²

It will be interesting to see what effect this new standard, “not yet clear either to doctors or to lawyers,” will have in the arena of sexual predator civil commitment.²⁹³

Finally, with *Crane* the United States Supreme Court has sent a troublesome message to state courts.²⁹⁴ The challenge in *Hendricks* stemmed from the Kansas Supreme Court not allowing the State to apply the Kansas SVPA as written.²⁹⁵ In *Hendricks*, however, the United States Supreme Court determined that the statute, as written, satisfied substantive due process requirements.²⁹⁶

Yet, that did not stop the Kansas Supreme Court from again finding a way to avoid enforcement of the Kansas SVPA, which it apparently did not want to apply.²⁹⁷ In *Crane*, the Kansas Supreme Court basically succeeded by establishing a new substantive requirement where one had arguably never even been considered.²⁹⁸ Although the United States Supreme Court did not allow a “total lack of control requirement,” it held that proof of inability to control dangerousness was necessary, when it had never before held such.²⁹⁹ Therefore, by ignoring the United States Supreme Court’s long line of precedent establishing two substantive requirements for sexual predator civil commitment, the Kansas Supreme Court essentially achieved its desired outcome. One cannot help but question the long-term effect of this message.

290. *Id.* at 6.

291. *Id.* at 7.

292. *Id.* at 5-6.

293. *Id.* at 6 (quoting *Foucha v. Louisiana*, 504 U.S. 71, 96 (1992) (Kennedy, J., dissenting)).

294. See *Crane*, 534 U.S. at 424 (Scalia, J. dissenting).

295. See *Kansas v. Hendricks*, 521 U.S. 346, 356 (1997).

296. See *id.* at 360.

297. See generally *In re Crane*, 7 P.3d 285 (Kan. 2000), vacated by *Crane*, 534 U.S. 407.

298. See *Crane*, 534 U.S. at 413.

299. *Id.* at 411-13.

V. CONCLUSION

To many, the civil commitment of sexually violent predators raises the concern of *nulle pene sine lege* – punishment without law. Civil libertarians fear the potential abuse of sexual predator acts as well as the possible constitutional violations posed by the civil commitment of sexual predators.³⁰⁰ However, many view sexual predator statutes as a necessary means of responding to those dangerous sexual offenders who are not amenable to criminal punishment, due to mental abnormalities or personality disorders, and must, therefore, be confined and treated until a physician decides that the offender is safe to return to society.³⁰¹

Kansas v. Crane does not support either side of this issue.³⁰² In *Crane*, the United States Supreme Court had the opportunity to further clarify the substantive due process requirements that it upheld in *Hendricks*. Instead, the Court arguably misinterpreted its own case precedent and overlooked a tradition of deference to state legislatures.³⁰³ Additionally, the Court left state courts confused about what degree of lack of control is required to commit a sexual predator, puzzled about what impairments must meet the *Crane* standard, and guessing as to how to prove “serious difficulty in controlling behavior.”³⁰⁴

However, whether the United States Supreme Court should have reversed the Kansas Supreme Court’s decision is debatable. Precedent suggests that the Kansas Supreme Court’s decision should have been reversed, leaving the decision on whether to insert a new lack of control requirement into the Kansas SVPA to the Kansas Legislature. Yet, if not properly restricted, the sexual predator statutes could dangerously landslide and commit more offenders than the statutes were intended to commit. As the Court stated in *Crane*, sexual predator acts must be narrowly tailored to separate those who offend due to a mental illness from the general prison population.³⁰⁵ Conversely, a state’s duty to protect its citizens from sexually violent predators and a state’s duty to protect those predators who suffer from mental illnesses are equally crucial. The answer to this debate over *Crane*, however, will best be resolved as the effect of *Crane* is revealed.

The aftermath of *Crane* illustrates the risks involved with the decision and the ineffectiveness of the *Crane* standard. Michael T. Crane had numerous prior sexual convictions and offenses, was diag-

300. See generally Stovall, *supra* note 13, at 35.

301. See generally *id.*

302. See generally *Crane*, 534 U.S. 407.

303. See *supra* notes 173-227 and accompanying text.

304. See *supra* notes 228-65 and accompanying text.

305. See *Crane*, 534 U.S. at 413.

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nosed with exhibitionism and an antisocial personality disorder, and had been described as a future threat of dangerousness due to his “combination of willful and uncontrollable behavior.”³⁰⁶ Therefore, he met all of the requirements of the Kansas SVPA.³⁰⁷ However, due to the decision in *Kansas v. Crane*, this sexual predator’s case was dismissed,³⁰⁸ and Crane is free to see if he will fulfill his prediction of future dangerousness.

306. *Id.* at 416-17 (Scalia, J., dissenting).

307. See KAN. STAT. ANN. §§ 59-29a01 to -29a20 (1994 & Supp. 2002).

308. Journal Entry of Dismissal, *In re Crane* (No. 97CV16409).

