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Freedom Is to Confinement as Twilight Is to Dusk: The Unfortunate Logic of Sexual Predator Statutes

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Freedom Is to Confinement as Twilight Is to Dusk: The Unfortunate Logic of Sexual Predator Statutes

I. INTRODUCTION

The “nature versus nurture” argument thrives in the literature on deviant sexual behavior.1 Many believe that sexual abuse during childhood leads to predatory behavior later on.2 Others believe that sexual violence, most of which males still perpetrate,3 is a direct result of societal forces and socialization.4 Others, who evaluate this phenomenon from a physiological perspective, believe that imbalances in brain chemicals cause the behavior.5 There may even be evidence that organic brain dysfunction results in sexual aggression.6 There is no indication, however, that the source must be either entirely nature or nurture; it is more likely that there are numerous factors that interact and lead to a pathology of sexual aggression.7 Whatever the cause, predatory sexual behavior1

2. See Simmons v. South Carolina, 512 U.S. 154, 157 (1994) (The defense proffered, as a mitigating factor, evidence that the defendant’s violent sexual behavior “reflected serious mental disorders that stemmed from years of neglect and extreme sexual and physical abuse.”); see also Ted Shaw et al., Cognitive-Behavioral Treatment Strategies for Adolescent Sex Offenders: The Integrated Model, in Sexual Aggression 275, 278 (Jon A. Shaw ed., 1999) (citing research that found that adolescents who committed “serious sexual offenses” had high frequencies of past abuse).
3. Currently, of all the sexually violent predators who are confined in the United States, only four are female. One of these four is confined in Farmington, Missouri. Geri L. Dreiling, Fallen Angel, Riverfront Times (St. Louis), Jan. 9, 2002, http://www.riverfronttimes.com/issues/2002-01-09/feature.html/print.html.
5. Id.
6. Id.
7. Id. at 121.
8. In this Summary, the phrases “sex offender,” “sexually violent predator,” and “sexual predator” are all intended to describe an individual who has been adjudged as one who engages in sexually violent behavior against an unwilling person due in part to a mental defect.
is a pervasive problem in American society,⁹ and both the legal and mental health communities have sought a balance between punishment and treatment of sexual predators.¹⁰

The legal community’s response to predatory sexual behavior has resulted in the proliferation of numerous statutes specifically dealing with offenders whose crimes seem to be linked to a mental abnormality.¹¹ The first of these statutes began to appear in the 1930s and they resurfaced at the end of the twentieth century.¹² The recent legislation has resulted in an increase in the number of mentally abnormal sex offenders among prison populations.¹³

The mental health community’s response to predatory sexual behavior has evolved from the draconian remedy of castration to the use of cognitive, behavioral, and drug therapy, each of which is frequently used to treat individuals who experience non-sexual and/or non-criminal psychiatric and psychological disorders. This Law Summary begins with a brief overview of the clinical treatment of sexual predators. The clinical background section enhances the discussion of legislation and jurisprudence because the adjudication of an individual as a sexually violent predator, in many states, involves testimony from medical experts and findings as to the individual’s ability to control his behavior, and, consequently, the likelihood that he will re-offend if he is released. This Law Summary then describes the legislative and judicial responses to sexual predators as well as the United States Supreme Court’s interpretation of sexually violent predator statutes and its declaration of their constitutionality. Finally, the last section illuminates potential flaws in the Court’s and the legislatures’ reasoning and proposes one possible solution.

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¹⁰. Scholars have stated that the basis for sexually violent predator legislation is that “[t]he ‘sexual psychopath’ is neither normal nor ‘legally insane’ and for that reason, requires special consideration, both for his own sake and for the safety of society. The purposes of the . . . statutes are thus twofold: to protect society and to rehabilitate the offender.” John Pratt, The Risé and Fall of Homophobia and Sexual Psychopath Legislation in Postwar Society, 4 PSYCHOL. PUB. POL’Y & L. 25, 26 (1998); see also Becker & Murphy, supra note 4, at 116. The legislation is supported by the assumption that once the offender is treated, he may be returned safely to the community.

¹¹. Becker & Murphy, supra note 4, at 116.


¹³. Becker & Murphy, supra note 4, at 116. Legislation resulted in a forty-eight percent increase of mentally abnormal incarcerated sex offenders in prison populations between 1988 and 1990. Id.
II. CLINICAL BACKGROUND

A. Clinical Assessment of Deviant Sexual Behaviors

Perhaps the greatest obstacle to the creation of a multi-disciplinary model of sex offender treatment is the variance among violent sex offenders. Just as there may be many causes for sexually aggressive behavior, there is not one simple diagnosis for offenders who commit acts of sexual aggression. Sexually violent predators ("SVPs") may be diagnosed with a panoply of psychiatric disorders. The fourth edition of the Diagnostic and Statistical Manual of Mental Disorders ("DSM-IV") is the general diagnostic tool used by practitioners in the field of psychiatry, including forensic psychiatry. The DSM-IV outlines diagnostic criteria for mental disorders in order to facilitate communication and uniformity of diagnoses among practitioners. Disorders that are characterized by "recurrent, intense sexual urges, fantasies, or behaviors that involve unusual objects, activities, or situations and cause clinically significant distress or impairment in social, occupational, or other important areas of functioning" are called "paraphilias." In order to fall into this DSM-IV classification, there must be a causal connection between the urges and diminished functioning.

14. This Part is intended to provide the reader a general overview so that he or she may better understand the legal issues in relation to the medical issues. It is by no means an exhaustive account of the issues present in the treatment of sex offenders. It is provided here for background purposes only.

15. RONALD M. HOLMES, SEX CRIMES 107 (2d ed. 1991) (citing the National Institute of Corrections sex offender typologies). Type one is comprised of first-time offenders who attribute the crime to stress or substance abuse. Id. The second type is the chronic offender who exhibits the most antisocial behavior. Id. The third and final type are chronic offenders who are "inept" and may be "mentally slow." Id.; see also Becker & Murphy, supra note 4, at 118 (stating that even the subgroups of paraphilias contain "a great deal of heterogeneity"). But cf. WILLIAM E. PRENDERGAST, TREATING SEX OFFENDERS IN CORRECTIONAL INSTITUTIONS AND OUTPATIENT CLINICS: A GUIDE TO CLINICAL PRACTICE 221 (1991) (stating that irrespective of offense, sex offenders share major personality traits).

16. Becker & Murphy, supra, note 4, at 117.

17. Becker & Murphy, supra, note 4, at 117.


19. Id. at 535 (emphasis added).

20. The paraphilias fall into the DSM-IV’s categorization of sexual and gender identity disorders. Id. There are numerous other categorizations in the DSM-IV, including personality disorders, eating disorders, and sleep disorders. See generally id.

21. It would be remiss to discuss aberrant sexual behavior without recognizing the difficulty an individual who experiences deviant urges might have in confronting his or
Individuals who have been adjudged sexually violent predators are frequently diagnosed with one of the paraphilias—exhibitionism, pedophilia, and sexual sadism. Mood and personality disorders, including antisocial personality disorder and depression, however, have also, along with her illness by seeking medical help. The fear of repercussions and embarrassment might deter these individuals from seeking treatment.

22. See id. at 566-76; see also HOLMES, supra note 15, at 17-35.

23. See generally Kansas v. Crane, 534 U.S. 407 (2002). The Crane dissent noted that “[t]hough exhibitionism alone would not support classification as a sexual predator, a psychologist concluded that the two [disorders—antisocial disorder and exhibitionism] in combination did place respondent’s condition within the range of disorders covered by the [Sexually Violent Predator Act]” based on the defendant’s particular propensity for aggression and disregard for the rights of others. Id. at 416-17 (Scalia, J., dissenting). Exhibitionism is a paraphilia. DSM-IV, supra note 18, at 569. The DSM-IV describes the diagnostic criteria for exhibitionism as:

A. Over a period of at least 6 months, recurrent, intense sexually arousing fantasies, sexual urges, or behaviors involving the exposure of one’s genitals to an unsuspecting stranger.

B. The person has acted on these sexual urges, or the sexual urges or fantasies cause marked distress or interpersonal difficulty.

24. See In re Salcedo, 34 S.W.3d 862, 866 (Mo. Ct. App. 2000). The DSM-IV diagnostic criteria for pedophilia are:

A. Over a period of at least 6 months, recurrent, intense sexually arousing fantasies, sexual urges, or behaviors involving sexual activity with a prepubescent child or children (generally age 13 years or younger).

B. The person has acted on these sexual urges, or the sexual urges or fantasies cause marked distress or interpersonal difficulty.

C. The person is at least age 16 years and at least 5 years older than the child or children in Criterion A.

DSM-IV, supra note 18, at 571-72.

25. See State ex rel. Nixon v. Askren, 27 S.W.3d 834, 836 (Mo. Ct. App. 2000). The diagnostic criteria for sexual sadism are:

A. Over a period of at least 6 months, 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.

B. The person has acted on these sexual urges with a nonconsenting person, or the sexual urges or fantasies cause marked distress or interpersonal difficulty.

DSM-IV, supra note 18, at 574.

26. See Kansas v. Crane, 534 U.S. 407, 411 (2002). Antisocial personality disorder is not a paraphilia, but a personality disorder. DSM-IV, supra note 18, at 701. In the general population, approximately three percent of males and one percent of females suffer from it. Id. at 704. The disorder is far more prevalent in prison populations than
other paraphilias, been reported as causing the volitional impairment that is associated with inability to resist aberrant sexual urges.

Although these disorders are associated with defendants who commit sex crimes, it is important to note that many individuals may possess some of the psychological features of one who commits sex crimes (i.e., he or she may have deviant sexual urges),28 but the individual may not act upon the urges or the urges may not interfere with that person's daily routine.29 For example, an individual may have sexual fantasies involving the humiliation of a sexual partner. This is one element of sexual sadism30 but the individual would not suffer from sexual sadism, unless and until he or she acted on those urges with a non-consenting partner or the fantasies caused marked distress or interpersonal difficulty.31 Additionally, many SVPs may suffer from other mental illnesses that are not paraphilias and are not sexual in nature.32 Likewise, not all violent among society at large. Crane, 534 U.S. at 412 (citing study that concluded that forty to sixty percent of males in prison populations are diagnosable with antisocial personality disorder). Some of its diagnostic features are:

A. [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 . . .
   (4) irritability and aggressiveness as indicated by repeated physical fights or assaults
   (5) reckless disregard for safety of self or others . . .
   (7) lack of remorse, as indicated by being indifferent to or rationalizing having hurt, mistreated, or stolen from another . . .

C. There is evidence of Conduct Disorder . . . with onset before age 15 years.

DSM-IV, supra note 18, at 706. Conduct disorder is a persistent behavior pattern characterized by at least three of the following behaviors: (1) aggression to people or animals; (2) destruction of property; (3) deceitfulness or theft; or (4) serious rule violations. Id. at 98-99, 706.

27. SeeAskren, 27 S.W.3d at 836. The clinician in this case reported “major depression” as a mental abnormality making it more likely that the defendant would re-offend. Unlike the paraphilias, depression is a mood disorder. There are a variety of disorders that could be described by the label “major depression,” including major depressive episode; major depressive disorder, single episode; and major depressive disorder, recurrent. Regardless of the type of depression, the patient who suffers from it will conform to the diagnostic criteria for major depressive episode. DSM-IV, supra note 18, at 356, 375-76.

28. See generally Becker & Murphy, supra note 4.

29. See DSM-IV, supra note 18, at 568.

30. See DSM-IV, supra note 18, at 574.

31. DSM-IV, supra note 18, at 574.

32. A number of the offenders who have been adjudicated sexually violent predators were diagnosed with anti-social personality disorder in addition to a paraphilia.
sex crimes will fall into the tenets of sexually violent predator legislation.33 For example, individuals who commit rapes against persons who are of the age of majority would not necessarily be classified as sexually violent predators under the current legislation even though their crimes are both sexual and violent in nature.34 Only when the crime is associated with a diagnosable mental abnormality35 which makes it difficult or impossible for the offender to control his behavior will the offender be labeled a sexually violent predator.

B. Treatment Models for Sexual Offenders

A discussion of treatment for sexually violent predators is incomplete without a summary of the various treatment models that have been utilized in the past with SVPs, particularly in light of the treatment justifications for the current commitment statutes.36 Initially, it is important to note that treatment is the only viable approach to sexual predators; a cure is beyond the mental health community’s current knowledge.37 Professor Holmes has stated that “[n]o responsible person would say that we cure sex offenders.... We give them tools to control their deviance.”38 These tools may include behavioral therapy, cognitive therapy, cognitive-behavioral therapy, and medical or drug therapy.39 Behavioral therapy, which is commonly identified as conditioning, is a system


33. Becker & Murphy, supra note 4, at 118.

34. There is a fine distinction between SVPs who are diagnosed with paraphilias and individuals who suffer from antisocial personality disorder and commit sex crimes as part of the pattern of disregard for the rights of others. The distinction is this: a person who suffers from antisocial personality disorder may simply seize an opportunity to commit a crime (sexual or otherwise) as part of a general disregard for individuals or simply to commit an act because it defies the law. An individual who suffers from a paraphilia, however, does not engage in such acts simply to defy authority. The precise cause of the behavior is not known. See supra note 1; see also supra note 26 discussing antisocial personality disorder.

35. Cf. Fallen Angel, supra note 3 (The perpetrator was adjudged a sexually violent predator based upon her diagnosis with HIV and her performing oral sex on a minor child on one occasion. She was deemed an SVP despite the fact that she stopped performing oral sex on the boy because she thought it was “nasty.”).


38. HOLMES, supra note 15, at 107.

of rewards and punishments used to modify behavior.\textsuperscript{40} For sex offenders, this may include aversive conditioning,\textsuperscript{41} in which an offender's sexual arousal is monitored as he or she is exposed to stimulus (e.g., pornographic photographs).\textsuperscript{42} Here, arousal is the unwanted behavior, and, if it occurs, the therapist will induce a negative reinforcement (e.g., exposure to a noxious odor).\textsuperscript{43} Behavioral therapy also includes the simple replacement of harmful, maladaptive behaviors with more positive ones.\textsuperscript{44} When behavioral therapy takes this form, however, the line between it and cognitive therapy becomes thin, in that the force of cognitive therapy is working with the offender to change "his basic perception of his own sex life and the world around him as it pertains to sex and his interactions with others."\textsuperscript{45} This generally includes working with the offender to develop coping mechanisms, such as anger management skills,\textsuperscript{46} sex education and human sexuality classes,\textsuperscript{47} relaxation classes,\textsuperscript{48} and social skills classes.\textsuperscript{49} Cognitive-behavioral therapy\textsuperscript{50} combines the theory of more positive thoughts as developed in cognitive therapy, with the practice of using those thoughts to make it through difficult situations when the subject is faced with a sexual

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40. HOLMES, supra note 15, at 107; see also DAVID G. MYERS, PSYCHOLOGY 552-53 (4th ed. 1995). Cognitive-behavioral therapy has two components. \textit{Id.} at 553. The cognitive element is based on the belief that negative thoughts and feelings about one's self (called catastrophizing) shape beliefs. The behavioral aspect involves developing replacement of the negative thoughts and beliefs with new, positive thoughts and practicing this technique. \textit{Id.}

41. Aversive conditioning is defined as a "type of counterconditioning that associates an unpleasant state (such as nausea) with an unwanted behavior (such as drinking alcohol)." MYERS, supra note 40, at G-1.

42. HOLMES, supra note 15, at 112.

43. HOLMES, supra note 15, at 112. Less severe cases of sexually violent responses may not require such drastic treatment.

44. MYERS, supra note 40, at 546.

45. HOLMES, supra note 15, at 112.

46. HOLMES, supra note 15, at 113.

47. Marques, supra note 37, at 440.

48. Marques, supra note 37, at 440.

49. Marques, supra note 37, at 440.

50. MYERS, supra note 40, at 553 ("Cognitive-behavioral therapy aims to make people aware of their irrational negative thinking and replace it with new ways of thinking and talking, \textit{and} to practice the more positive approach in every day settings.").
\end{flushleft}
stimulus.\textsuperscript{51} This method is fairly common in the literature and has enjoyed some limited success.\textsuperscript{52}

Where the use of psychological models of therapy is ineffective,\textsuperscript{53} or where the need for results is immediate, psychiatric drugs may offer solutions more promising than cognitive or behavioral approaches.\textsuperscript{54} These may include the use of anti-depressants,\textsuperscript{55} such as Prozac, to alter the offender's mood or the use of antiandrogens to lower testosterone levels.\textsuperscript{56} The use of drug therapy was instituted as an alternative to the somewhat draconian remedy of castration, which, until the 1980s, was a recommended means of preventing future offenses.\textsuperscript{57} The effect of these drugs is to reduce the "frequency and intensity of

\textsuperscript{51} For a review of the efficacy of one cognitive-behavioral treatment program, see Marques, supra note 37, at 441-44. Subjects in the program had two years of intensive treatment involving three ninety-minute sessions per week and post-release follow-up. \textit{Id.} The treatment group in this study differs slightly from the description of a sexually violent predator under Kansas and Missouri law. \textit{Id.} The subjects were either rapists or child molesters, and some were not convicted of any sexual crime; their involvement in the program was supported by ample evidence that a sexual crime occurred, though there was no successful prosecution. \textit{Id.} After two years of cognitive-behavioral therapy and at least five years at risk (post-release), Marques found that overall, those offenders who had participated in the treatment re-offended with about the same frequency as those who had not. \textit{Id.}


\textsuperscript{54} \textit{Id.} According to Dr. Katz, who wrote about sexual offender treatment in adolescents, there are four situations in which the use of drug therapy may be preferable: Because the etiology of sexual aggression is so complex, psychopharmaceutical treatment has been utilized for 1) offenders who have been unresponsive to other treatment modalities, 2) offenders who pose an immediate risk to society and must be prevented from reoffending, 3) offenders with comorbid psychiatric disorders that may have an impact on their sexual offending (e.g., obsessive compulsive disorder], [attention deficit/hyperactivity disorder], intermittent explosive disorder), and, by far the most common usage, 4) offenders with paraphilias, or persistent, deviant sexual urges, in which the goal of treatment is to reduce sexually deviant behavior by suppressing the sexual drive.

\textit{Id.}

\textsuperscript{55} \textit{Id.} at 316.

\textsuperscript{56} \textit{Id.} at 309.

\textsuperscript{57} \textit{Id.}
sexual urges in general rather than by influencing the nature of those urges" as is done in cognitive and behavioral therapy.

There is more controversy surrounding the use of hormone-altering drugs, aside from the obvious ethical implications. The administration of some mood altering or hormone adjusting drugs has been associated with numerous severe side effects. The use of Depo-Provera, for example, a hormone altering drug typically used for birth control, has been associated with effects like diabetes, depression, high blood pressure, and fatigue. Furthermore, practitioners may, in some cases, consider drug therapy the best option only to have the offender decline treatment. This puts the practitioner in the position of having to decide whether to medicate the offender against his will. This issue, too, has broad constitutional and ethical implications.

Although the pathology of sexual predators is shrouded in mystery, one truth has become evident: treatment programs must be all-inclusive to accommodate the multi-causal nature of sex offenses. Furthermore, because it is summarily assumed that an offender will continue to have deviant urges, aftercare is necessary to ensure that the offender continues to utilize the tools he learned in treatment. It also seems clear that, just as deviant behavior has many causes, so too must the treatment of that behavior be multi-faceted. The mental health community’s response has, in the past decade, evolved into a more humane approach than was taken in the past and which considers the pathology of each individual and tailors an appropriate response. The inquiry now turns to a consideration of whether the legal community’s approach has been similarly progressive and what the implications of that approach are for society at large.

III. LEGAL BACKGROUND

A. Legislation

Just as the clinical approach to dealing with predatory sexual behavior has evolved throughout the twentieth century, so has the legislative approach. The greatest proliferation of statutes intended to deal with the problem of sexual predators occurred in the middle of last century when twenty-six states enacted sexual psychopath legislation. The District of Columbia participated in this

58. Id.  
59. HOLMES, supra note 15, at 113.  
60. See Becker & Murphy, supra note 4, at 121.  
61. See generally PRENDERGAST, supra note 15.  
63. Pratt, supra note 10, at 26 ("Between 1937 and 1960, 26 states in the United States introduced sexual psychopath laws.").
new wave of legislation with the enactment of its Sexual Psychopath Act in 1948. The purpose of the Act, according to the Senate Committee on the District of Columbia, was to provide a "humane and practical approach to the problem of persons unable to control their sexual emotions." Further, the language of the Act specifically linked lack of volitional control to compromising public safety. This legislation, like today’s legislation, relies strongly upon the presumption that individuals who commit sexual crimes are unable to control their behavior.

The 1960s and 1970s brought the repeal of many of the laws passed earlier in the century. In the 1990s, however, there was renewed interest in how society addresses the problem of sex offenders, caused in part by the tragic disappearance of three little girls in New Jersey. Two statutory mechanisms have resulted from this concern: (1) offender registration/community notification statutes and (2) statutes allowing for the commitment of sexual offenders to mental health facilities. Currently, more than fifteen states have some type of civil commitment statutes for sexually violent offenders.

64. See Millard v. Harris, 406 F.2d 964, 966 (D.C. Cir. 1968).
65. Id. (citing S. REP. NO. 80-1377, at 5 (2d. Sess. 1948)).
66. Millard, 406 F.2d at 967.
67. The the 1967 version of the Act states: The term “sexual psychopath” means a person, not insane, who by a course of repeated misconduct in sexual matters has evidenced such lack of power to control his sexual impulses as to be dangerous to other persons because he is likely to attack or otherwise inflict injury, loss, pain or other evil on the objects of his desire.

Id. (citing D.C. CODE ANN. § 22-3503(1) (1967) (currently § 22-3803(1) (2001))).
68. Pratt, supra note 10, at 38. Many believe this was a result of the general deregulation of morality.
69. See Sheila A. Campbell, Note, Battling Sex Offenders: Is Megan’s Law an Effective Means of Achieving Public Safety?, 19 SETON HALL LEGIS. J. 519 n.3. In 1994 in New Jersey, three separate, tragic incidents focused public attention on released sex offenders. Id. Each of the victims was a young girl, aged six or seven, raped and killed by a convicted offender who had been released. Id. One of the girls, Megan Kanka, was the namesake of “Megan’s law,” which requires offenders to register when they are returned to the community. Id.; see also Pratt, supra note 10, at 35 (referring to a researcher’s 1938 remarks about the “mass hysteria” caused by the “considerable number of reported criminal cases in which children or young women have been attacked”).
71. Id.
Washington, Kansas, Missouri, Iowa, and Illinois have each enacted sexual predator legislation that allows for the commitment of sexually violent predators. Kansas adopted its version in 1994, and this act was the first in the modern wave of sexually violent predator legislation to go before the United States Supreme Court. It has done so twice now with arguably inconsistent results.

The Kansas legislature enacted that state’s sexually violent predator legislation in part because it found the existing civil commitment statutes to be insufficient to cover this group of offenders. It stated:

The legislature finds that there exists an extremely dangerous group 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. Because the existing civil commitment procedures under K.S.A. 59-2901 et seq. and amendments thereto are inadequate to address the special needs of sexually violent predators and the risks they present to society, the legislature determines that a separate involuntary civil commitment process for the potentially long-term control, care, and treatment of sexually violent predators is necessary. The legislature also determines that because of the nature of the mental abnormalities or personality disorder from which sexually violent predators suffer, and the dangers they present, it is necessary to house involuntarily committed sexually violent predators in an environment separate from persons involuntarily committed under K.S.A. 59-2901 et seq. and amendments thereto.

The basic assumption behind the Act is clear from this provision; individuals who commit sexually violent crimes pose such a great threat to society that they must live separately and receive treatment for their condition. The separate treatment issue in and of itself could present complicated constitutional issues. The Act contains numerous safeguards, however, designed to protect offenders from its overzealous application. First, when the attorney general files a petition with the court prior to an offender’s release, the judge must determine that there is probable cause to believe that the named person is a sexually violent

74. The Missouri law is patterned after the Kansas SVP Act. See MO. REV. STAT. §§ 632.480-.513 (2000); see also In re Salcedo, 34 S.W.3d 862, 864-66 (Mo. Ct. App. 2000) (outline of civil commitment procedure under the Missouri Act).
76. KAN. STAT. ANN. § 59-29a01 (1994).
77. See KAN. STAT. ANN. § 59-29a07 (1994) (requiring that offenders convicted under the Act be segregated from other individuals in social service care).
predator. Second, at the probable cause hearing, the offender is entitled to counsel, to present a case on his behalf, and to cross examine the state’s witnesses. Further, the offender is entitled to access all the documents filed with the court. The proceedings go forward only if the court finds probable cause to believe the offender is a sexually violent predator. A jury will be sworn at the “demand” of any of the parties or the judge. The factfinder, be it jury or judge, must find beyond a reasonable doubt that the offender is an SVP. Finally, if a jury makes the determination, it must be by a unanimous verdict. Although all of the safeguards for a criminal procedure are present in the SVP Act, it is contained in the Kansas Probate Code. Soon after the Act was codified, the United States Supreme Court had an opportunity to explore its contours.

B. Case Law

1. Kansas v. Hendricks

The state of Kansas utilized its Sexually Violent Predator Act for the first time in 1994. After ten years of confinement, Leroy Hendricks was scheduled for release to a halfway house. In 1984, he had been convicted of taking “indecent liberties” with two thirteen year-old boys. Prior to his incarceration in 1984, Hendricks had been confined on five occasions for five separate sex

78. Id. § 59-29a05(a).
79. Id. § 59-29a05(c).
80. Id.
81. See id. § 59-29a02(a) (defining a sexually violent predator as “any person who has been convicted of or charged with a sexually violent offense and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in repeat acts of sexual violence”).
82. Id. § 59-29a06.
83. Id. § 59-29a07(a).
84. Id.
85. This Law Summary focuses on the United States Supreme Court jurisprudence because two recent cases from the Court, Hendricks and Crane, have set the parameters by which all other sexual predator statutes must abide. Additionally, given the novelty of the statutes, there is very little interpretive jurisprudence, particularly in Missouri.
86. Kansas v. Hendricks, 521 U.S. 346, 350 (1997). Justice Thomas wrote an exhaustive opinion for Hendricks. In the interest of space, only the most relevant portions are discussed herein.
87. Id. at 353.
88. Id.
89. It appears from the Supreme Court decision that Hendricks was incarcerated four times and confined to a psychiatric hospital another time. Id. at 354.
crimes against children, and admitted to engaging in more criminal sex acts than the acts for which he was confined. His history of sexually abusing children spanned almost three decades.

Pursuant to the Kansas Sexually Violent Predator Act ("Act"), the State of Kansas sought to commit Hendricks for psychiatric treatment in lieu of placing him in a halfway house. At the trial phase, Hendricks testified before a jury that he could not control his urge to molest children, particularly when he felt stressed, and the only way for him to stop his abusive behavior was "to die." He also stated, in colorful language, that treatment was ineffective. The jury found Hendricks was an SVP, arguably as the result of his own testimony, and committed him.

2. Constitutional Issues

Hendricks' subsequent appeal did not argue his adjudication as a sexually violent predator, nor did it argue that the trial court erred by finding that pedophilia is a "mental abnormality." Instead, Hendricks claimed that the Kansas act violated his Due Process rights and violated both the Double Jeopardy and Ex Post Facto clauses of the United States Constitution. The Kansas Supreme Court found that the Act did, in fact, violate Hendricks' substantive due process rights, but the Court did not address the ex post facto or double jeopardy claims. The State of Kansas then appealed to the United States Supreme Court. The Supreme Court's decision, which found the Kansas act unconstitutional as applied, is vitally important to understanding legal perceptions of mental illness. Its declaration of the constitutionality of post-

90. Id. at 354-55.
91. The first conviction was based on a 1955 offense. Most recently, Hendricks was convicted in 1984. Id. at 353-55.
92. Id. at 354.
93. Id. at 355.
94. At one point, Hendricks told the state's physician that "treatment is bullshit."
95. Id. The Supreme Court opinion indicates that Hendricks underwent treatment on three occasions. In 1965, after treatment attempts, he was deemed to be "safe at large." In 1967, after another offense, he refused treatment for his pedophilia. In 1972, he began a treatment program, but subsequently abandoned it. Id. at 354-55.
96. Id. at 355-56.
98. U.S. CONST. amend. V.
100. Hendricks, 521 U.S. at 356.
101. Id.
102. Id.
release confinement, although seemingly counterintuitive, has set the standard and provided the terms of discourse for the confinement of sexual predators.

The opinion, which Justice Thomas authored, begins with the axiom that liberty rights are not absolute and can be overridden where a public safety interest is served. A commitment statute that comports with "proper procedures and evidentiary standards" likely will be found constitutional. The question the Court faced, then, was whether the Kansas Sexually Violent Predator Act met the procedural and evidentiary standards. The Court held that it did. In so doing, the Court compared the Kansas statute with statutes of a similar nature that the Court had considered before and stated that the important component of the statutes is that each requires an additional finding that dangerousness is related to mental abnormality. Justice Thomas stated:

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. The 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.

Justice Thomas then delineated two factors present in Hendricks' case that, taken together, satisfied due process: (1) Hendricks' purported inability to control his behavior and (2) the medical community's predictions about his proclivity to engage in violent sexual behaviors. He stated:

Hendricks . . . conceded that, when he becomes "stressed out," he cannot "control the urge" to molest children. 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

103. Id. at 356-57.
104. Id. at 357.
105. Id.
108. Id. (citations omitted).
109. Id. at 360.
Thus, the due process standard for commitment of sexually violent offenders appeared to be set. As long as the state could support a petition for post-release commitment with a showing of lack of volitional control and evidence of a probability of future offenses, it was acting within the confines of due process.\textsuperscript{111}

Although the Kansas Supreme Court declined to address the ex post facto and double jeopardy claims, the United States Supreme Court did address them.\textsuperscript{112} The force of Hendricks’ arguments regarding these claims was that Kansas’ Sexually Violent Predator Act, although contained in the Kansas Probate Code,\textsuperscript{113} created a criminal proceeding and that commitment under the Act was synonymous with punishment.\textsuperscript{114} Resorting to simple theories of statutory interpretation,\textsuperscript{115} the Court found that the legislature did not intend to create and did not in fact create a criminal procedure when it created the Act.\textsuperscript{116} Still, according to the Court, Hendricks could have prevailed in his assertion that the Act was punitive had he been able to prove that “the statutory scheme [is] so punitive either in purpose or effect as to negate [the State’s] intention to deem it ‘civil.”’\textsuperscript{117} Evidence that the Act served a retributive or deterrent function would have supported Hendricks’ charge that the Act was punitive in nature and, therefore, violated double jeopardy.\textsuperscript{118} The Court gave three primary reasons why Hendricks’ argument failed. First, the use of prior conduct and mental condition served evidentiary purposes only; they were not used for purposes of

\begin{itemize}
\item 110. \textit{Id.} (citations omitted). The American legal system has long recognized that individuals should not be punished purely for their propensities. \textit{See} \textit{Fed. R. Evid.} 404 (making the defendant’s propensities irrelevant). The United States Supreme Court, however, has found that “[p]revious instances of violent behavior are an important indicator of future violent tendencies.” \textit{Hendricks}, 521 U.S. at 358 (quoting \textit{Heller} v. \textit{Doe}, 509 U.S. 312, 323 (1993)) (internal quotation marks omitted).

\item 111. For a discussion of possible flaws in the Court’s analysis, see \textit{infra} notes 157-83 and accompanying text.

\item 112. \textit{Hendricks}, 521 U.S. at 356, 360-61.


\item 114. \textit{Hendricks}, 521 U.S. at 361.

\item 115. The Court considered the Act’s placement in the Probate Code, the title of Article 29 of the probate code (“Care and Treatment for Mentally Ill Persons”) and the description of what the Act creates (“civil commitment procedure”). \textit{Id.}

\item 116. \textit{Id.}


\item 118. \textit{Id.} at 361-62.
\end{itemize}
determining culpability.119 Second, the language of the Act does not require a criminal conviction.120 It clearly applies to individuals who were charged with a sexually violent offense, whether or not a conviction resulted. Hence, if applied as written, it simply could not be a double jeopardy violation121 because individuals charged under the Act may never have had a trial. Third, the Court stated that the lack of a scienter122 requirement is what has traditionally separated civil and criminal proceedings.123 The Act does not require that a defendant have knowledge or intent. It simply requires that the defendant have a mental abnormality.124

The Court’s ex post facto analysis used essentially the same reasoning.125 Because the Act neither imposes punishment nor purports to, and because the Act lacks retroactive effect, “its application does not raise ex post facto concerns.”126

With these declarations, the Court, in keeping with the times, gave its blessing to post-release commitment statutes that recognize mental abnormalities as the cause of sexually violent behavior. For three years, Hendricks controlled this issue. In 2002, however, ascertaining whether states comported with the required evidentiary standards became markedly more difficult.

119. Id. at 362.

120. Id. The Act defines a sexually violent predator as “any person who has been convicted of or charged with a sexually violent offense and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in repeat acts of sexual violence.” KAN. STAT. ANN. § 59-29a02 (1994) (emphasis added).

121. The Supreme Court opinion contains a more exhaustive discussion of why the Act does not violate double jeopardy. Hendricks, 521 U.S. at 369-70. That discussion is excluded from this Summary because it is based upon the principle stated above: where the Act is civil and non-punitive in nature there is no second prosecution. Hence, double jeopardy does not apply.

122. “Scienter,” as the Court used the term, indicates a knowing mental state. See BLACK’S LAW DICTIONARY 938 (7th ed. 1999).

123. Hendricks, 521 U.S. at 362.

124. Id.

125. Id. at 370.

126. Id.
IV. RECENT DEVELOPMENTS

In January 2002, the United States Supreme Court explored its previous decision in *Hendricks* and concluded that the language of the Kansas statute calls for an additional finding that the sexually violent defendant is unable to control his or her behavior. The post-release commitment of Michael Crane, a convicted sexual offender, was the catalyst for the State of Kansas’ challenge to the Kansas Supreme Court’s narrow interpretation of Kansas’ SVP Act.

Crane’s conviction arose from two incidents that occurred the night of January 6, 1993. First, Crane exposed himself to a tanning salon clerk. He then went to a video store, which was approximately six blocks away, and waited until he was the only customer in the store. When he was alone with the video store clerk, he approached her from behind, lifted her off the ground, and carried her away from the front door and window. During a physical struggle, Crane exposed his genitals to the video store clerk and made numerous demands for oral sex. At one point during the struggle, Crane placed his hands around the clerk’s neck and squeezed. He also threatened to rape her. He then stopped suddenly and fled the scene. At his criminal trial, Crane was convicted of lewd and lascivious behavior for exposing himself to the tanning salon clerk, and he plead guilty to one count of aggravated sexual battery for the incident at the video store.

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127. Most recently, Jerry P. Inman, who was committed as an SVP for sex crimes involving three teenage girls, became the first SVP to be released from Kansas’ sexual predator program. Dawn Bormann & Tony Rizzo, *Ex-area man first to be released completely from Kansas Sexual predator program*, KansasCity.com (Sept. 28, 2002), http://www.kansascity.com/mld/kansascity/news/4166951 (last visited Oct. 10, 2002).


129. *Id.* at 410-11.


131. *Id.*

132. *Id.* at 1259.

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.*


139. *Id.* The plea agreement in this case represents a collateral use of SVP legislation to restrain an SVP whose conviction under criminal law was less than what the victim and the prosecution had hoped for. See *infra* note 179 and accompanying text (describing how a Johnson City prosecutor accepted a lesser plea from the defendant with
After his sentence was served, the State of Kansas petitioned for Crane’s commitment and was initially successful at the district court level. Crane’s commitment was based, in part, upon psychiatric testimony that he suffered from both exhibitionism and antisocial personality disorder. The Kansas Supreme Court reversed, however, finding that Crane’s commitment violated his due process rights. In arguing its case before the United States Supreme Court, Kansas took the position that the Kansas Supreme Court misapplied Hendricks by requiring a showing that a potential sexually violent predator is completely unable to control his or her behavior. The United States Supreme Court found this element of the Kansas Supreme Court’s approach unduly rigid, stating, “[i]nsistence upon absolute lack of control would risk barring the civil commitment of highly dangerous persons suffering severe mental abnormalities.” Nevertheless, the majority held that, in addition to Hendricks’ requirements of (1) a mental abnormality or personality disorder that (2) renders an offender likely to commit future crimes, a third finding is required. The final requirement, the majority held, is a finding that “the subject suffers from an inability to control [his or her] behavior.” The degree to which lack of volitional control must be demonstrated is unclear, although the Court acknowledged that mathematical precision is unattainable. Justice Breyer stated:

It is enough to say that there must be proof of serious difficulty in controlling behavior. And this, when viewed in light of such features of the case as the nature of the psychiatric diagnosis, and the severity of the mental abnormality itself, must be sufficient to distinguish the dangerous sexual offender whose serious mental illness, abnormality, or disorder subjects him to civil commitment from the dangerous but typical recidivist convicted in an ordinary criminal case.

the hope that the sexually violent predator act would prolong his confinement after his incarceration ended). This collateral use of the statute presents additional constitutional questions that no court has yet addressed. See infra notes 176-80 and accompanying text.

140. Crane, 534 U.S. at 411.
141. In re Crane, 7 P.3d at 294.
142. Crane, 534 U.S. at 410.
143. Id. at 412.
144. Id. at 423 (Scalia, J., dissenting).
145. Id. (Scalia, J., dissenting).
146. Id. at 412 (citing the now famous language from the American Psychiatric Association’s Statement on the Insanity Defense that “[t]he line between an irresistible impulse and an impulse not resisted is probably no sharper than the difference between twilight and dusk.”).
147. Id. at 412.
Here, Justice Breyer set the nebulous constitutional standard for finding that the subject is unable to control his behavior: serious difficulty in controlling behavior taken in context with the remaining facts of each case. The Court reasoned that a nebulous standard is acceptable in cases like Crane for two reasons. First, the state ultimately applies its own definition of mental abnormality. Second, the mental health field is dynamic and imprecise, leaving courts and practitioners alike with inconsistent concepts of mental health. Thus, guidance, as opposed to a rigid standard, is preferable.

The Court next turned to the question of volition. Like Justice Thomas’ opinion in Hendricks, the Crane majority’s interpretation rests heavily on the assumption that sexual predators cannot control their urges to commit sexual crimes. This presumption leads to the Court’s ultimate holding: commitment in the absence of some showing of volitional impairment offends the Constitution.

In a dissenting opinion, Justice Scalia ardently objected to the majority’s reading of the statute largely due to the fact that the same Court had held that the same statute comported with constitutional requirements just five years before. Because the statute had been declared constitutional in the first case, Justice Scalia argued, a finding that it was unconstitutional in the absence of an additional element, without any confounding events, is simply wrong. Justice Scalia did not suggest that volitional impairment is irrelevant; rather, he argued that the volitional element—“difficulty, if not impossibility”—of controlling behavior is “embraced” within the finding of a mental abnormality. Justice Scalia’s final criticism of the majority opinion was that it provided the trial courts “not a clue” as to how to charge a jury. Furthermore, one need not be a legal scholar to appreciate problems of a statute previously adjudged constitutional, that, upon second application, is found constitutionally insufficient.

148. Id. at 413.
149. Id.
150. Id.
151. Id. at 414.
152. Id. at 413.
153. Id. at 415 (Scalia, J., dissenting).
154. Id. at 416 (Scalia, J., dissenting).
155. Id. at 420 (Scalia, J., dissenting).
156. Id. at 423 (Scalia, J., dissenting).
V. Discussion

In the arena of sexual predator jurisprudence, there are few solid truths; after Crane, there appear to be even fewer. Two truths, however, seem certain. The first is that liberty rights are not absolute and can be overridden in the interest of public safety.157 The second truth is that sexual predators present a threat to the public safety and, thus, must be confined.158 The Kansas statute, which embodies this principal, adds another:159 individuals committed pursuant to the SVP Act must be confined separately from other committed individuals.160 This practice is reminiscent of quarantine practices prevalent in the medical community around the turn of the twentieth century. Sexual predators are similarly deemed too destructive to be in society and too dangerous even to be integrated with other individuals with mental illnesses. These perceptions, coupled with the Supreme Court’s approach to the volitional impairment issue, reflect society’s feelings about sexual predators: they are pariahs, but they might not be responsible for their behavior.

The belief that individuals with mental abnormalities, as defined in the Kansas Act, are unable to control their behavior is evident in both Justice Thomas’ and Justice Breyer’s opinions,161 but there is little evidence of such impairment outside the Justices’ writings. The Hendricks opinion states that the “added statutory requirements serve to limit involuntary civil confinement to those who suffer from a volitional impairment rendering them dangerous beyond their control.”162 The Crane court endorsed this position, stating:

We agree that Hendricks limited its discussion to volitional disabilities. And that fact is not surprising. The case involved an

158. See supra notes 9 and 77; see also Seling v. Young, 531 U.S. 250, 262 (2001) ("We acknowledged that not all mental conditions were treatable. For those individuals with untreatable conditions, however, we explained that there was no federal constitutional bar to their civil confinement, because the state had an interest in protecting the public from dangerous individuals with treatable as well as untreatable conditions.").
159. See supra note 77.
161. See supra notes 86-156 and accompanying text.
162. Hendricks, 521 U.S. at 358; see Winick, supra note 70, at 520 ("Justice Thomas’ repeated references to Hendricks’ inability to control his conduct as a justification for placing sexual predator laws in the same category of civil commitment statutes previously upheld by the Court strongly suggests that the Court viewed such uncontrollability as a constitutional prerequisite for the commitment of dangerous individuals.").
individual suffering from pedophilia—a mental abnormality that critically involves what a lay person might describe as a lack of control.\footnote{163}

The opinion provides no evidence of why a lay person would envision pedophiles as having no volitional control. The accepted definition of pedophilia contains no such element.\footnote{164} Why the lay opinion should have influence on this highly technical area of the law is also unclear. Certainly, society is hesitant to punish individuals who are believed to be \textit{unable} to control their criminal behavior. In these situations, punishment would lack its desired deterrent effect. Acquittal by reason of mental defect statutes are examples of this phenomenon.\footnote{165} The general understanding is that where an individual has volitional control and commits a crime, he or she should be punished because the deviant behavior was the result of a conscious choice. Where an individual has no control over his or her criminal actions due to a mental condition, however, the individual is not held responsible for his or her behavior. The distinction is therefore evident: individuals with no volitional control cannot be held responsible and, because they have no choice in their actions, cannot be deterred. Thus, punishment would be futile. Although these individuals may escape criminal liability, they are generally confined and treated. Where an individual is culpable, he or she is punished. Lack of control, conversely, warrants treatment instead of punishment. The flaw in sexual predator statutes is that the legislatures sought to strike a balance between these two approaches, but such a balance is inherently impossible. An offender cannot at once choose to engage in behavior (culpability) and at the same time be unable to control it (volitional impairment). The legal system, while struggling with whether to declare sexual predators mentally unsound or evil, is having it both ways, at the expense of logic.

Furthermore, the Court’s sweeping declaration that sexual predators are volitionally impaired is precarious at best. There is no empirical support suggesting that individuals who are diagnosed with one of the paraphilic disorders lack volitional control.\footnote{166} It is not suggested that medical and legal conceptualizations always nest comfortably, but, generally, there should be some established medical truth behind the legal conceptualization of a disorder. There appears to be none here. Evidence of an inability to control behavior is absent in both the diagnostic tools and the therapeutic literature.\footnote{167} Crane’s requirement

\begin{footnotes}
\item[164] See supra note 24.
\item[165] See MO. REV. STAT. § 552.040 (2000).
\item[166] Becker & Murphy, supra note 4, at 119; Winick, supra note 70, at 521.
\item[167] See generally Winick, supra note 70; see also sources cited supra note 10.
\end{footnotes}
of a separate finding of some degree of inability to control behavior essentially codifies a faulty understanding of mental health.

Treatment, the Court suggests, is an ancillary purpose of sexual predator statutory schemes. The Kansas legislature, however, implies that differences in treatment needs for SVPs and non-SVPs subject to civil commitment as well as non-SVP prisoners necessitated the promulgation of the Act itself. If treatment is in fact a goal of the legislation, the legal community’s concept of it needs to be better squared with current psychiatric knowledge. First, the cognitive and behavioral therapies carry with them the presumption that an individual, when given the appropriate tools, can control his or her behavior, although he might not be cured of his abnormality. This assumption is necessarily counter to the law’s requirement that the predator cannot control his behavior. Where an individual lacks volitional control, treatment tools would be of no use.

Second, as noted above, a purpose of the SVP legislation, whether ancillary or primary, is long-term care and treatment that would ultimately prepare a sexual predator for life in society. This assumption, too, is counter to what is generally known in the mental health community—there is no cure. The Court noted that “[t]he legislature . . . finds that the prognosis for rehabilitating sexually violent predators in a prison setting is poor, the treatment needs of this population are very long term and the treatment modalities for this population are very different than the traditional modalities for people appropriate for [civil] commitment.” The Court, thus, acknowledges that there is little hope for treatment, but declares treatment, coupled with commitment, the only plausible solution. The legislative language, however, acknowledging that sexual offenders are of a different kind, seems to envision a solution more like an acquittal by reason of mental abnormality scheme. It is likely, however, that society finds predators’ acts so utterly abhorrent that relief from culpability would leave victims’ rights unvindicated.

Another problem with the statutory and constitutional treatment scheme of SVP legislation is that it is gratuitously optimistic. The realities of treatment and the mental health community’s insistence to label any treatment modality as successful is incongruous with the intent of the statutes. For instance, the Marques treatment program discussed supra engaged offenders in intensive

169. Id. at 351 (quoting KAN. STAT. ANN. § 59-29a01 (1994)) (internal quotation marks omitted).
170. Id.
171. Id. at 351. The Court does not discuss the different treatment modalities.
172. See supra note 37 and accompanying text.
treatment for two years. The Kansas statute allows commitment in only one-year intervals. Furthermore, even after two years of extensive therapy, the program was marginally successful in that "the treatment group (those completing the program) and the volunteer controls have just about the same rate for new sex offenses." Finally, although the Hendricks Court's reasoning may have been flawless on the issue of whether the statute, as written, was punitive, it appears to have been applied punitively in at least one instance. The SVP Act, as drafted, envisions a post-conviction psychiatric analysis pursuant to the Attorney General's request. Whether the legislature's intent was punitive is inconsequential; the Supreme Court of the United States has declared that SVP proceedings are civil in nature and comport with constitutional requirements. It is clear from the Kansas Supreme Court's opinion in In re Crane, however, that the prosecution, unsure that it could sustain a sufficient conviction under the Kansas Criminal Code, lessened the charges Crane faced and counted on the use of SVP legislation at the end of his sentence to prolong his detention. The opinion states:

At the commitment trial, the [video store] victim expressed her disappointment in the course Crane's prosecution had taken . . . the prosecutor had suggested to her that obtaining a guilty plea [to one count of aggravated sexual battery] "was the best way to go in order to be able to go down the line" and use the option of the [Sexually Violent Predator] Act. The victim agreed to the plea bargain because she believed "it was the only way to make sure that it didn't end there." The victim testified, "I was not aware that there was an option of going to trial and going through this or agreeing to the plea and then using the Sexual Predator Act [sic]. As I . . . understood, this was the only option, but if we can get . . . some kind of a conviction, then we can use this option later down the road to make sure he stays off the street."  

173. See supra note 37 and accompanying text.  
175. Marques, supra note 37, at 444. Marques notes, however, that sampling error may have skewed this result. For a review of actuarial recidivism rates, see Becker & Murphy, supra note 4, at 124-29.  
176. KAN. STAT. ANN. § 59-29a04(a) (1994).  
179. Id.
Nevertheless, the issue raised on transfer to the Kansas Supreme Court was "whether it is constitutionally permissible to commit Crane as a sexual predator absent a showing that he was unable to control his dangerous behavior." 180 No matter what the vehicle, the application of the statute in this case was punitive. Simply put, the prosecutor here used the SVP Act to circumvent the criminal process and relied on the Act to sustain detainment. Clearly, this is not what the Supreme Court had in mind when it ruled in Hendricks.

One possible solution to all of these problems is that the adjudication of an individual as a sexually violent predator should occur at the trial phase. Although there is no perfect solution to this imperfect problem, this approach may be less offensive to science and the law. This proposal is based upon the assumption that, regardless of whether sexual predators have a volitional impairment, they fall outside the traditional ambit of criminal law. Nevertheless, their dangerousness suggests that perhaps the criminal justice system is better equipped to contain them. The same year the Kansas legislature breathed life into the SVP Act, the United States Supreme Court approved charging a jury with finding a likelihood of future dangerousness at deliberation. 181 It stated:

Arguments relating to a defendant’s future dangerousness ordinarily would be inappropriate at the guilt phase of a trial, as the jury is not free to convict a defendant simply because he poses a future danger, nor is a defendant’s future dangerousness likely relevant to the question whether each element of an alleged offense has been proved beyond a reasonable doubt. But where the jury has sentencing responsibilities in a capital trial, many issues that are irrelevant to the guilt-innocence determining step into the foreground and require consideration at the sentencing phase. The defendant’s character, prior criminal history, mental capacity, background, and age are just a few of the many factors, in addition to future dangerousness, that a jury may consider in fixing the appropriate punishment. 182

This approach, though applied in a capital case, is relevant here. Certainly it is likely that the jury would be unforgiving of an individual who victimizes individuals, many of whom are children. Still, there is little meaningful distinction between an extended incarceration and prolonged commitment in a facility where the efficacy of treatment is questionable. There could be safeguards in this approach as well. The jury could first make its determination of guilt or acquittal of the sex crime and return its verdict. Then, at sentencing,

180. Id.
182. Id. at 163.
the prosecution could introduce expert testimony about future dangerousness. Under Simmons, this proposal is constitutional and would serve the same ultimate purpose as the SVP laws: confining predators in the interest of public safety. The SVP approach, on the other hand, places undue weight on volitional impairment and too little emphasis on the ultimate goal—preservation of public safety.

VI. CONCLUSION

Incarceration and civil commitment make strange bedfellows. The legal system's twisting of general principles of both law and logic is indicative of a true struggle that has haunted the legal system in the area of mental health.183 It must be recognized, however, that new systems are fraught with uncertainty in early stages. Here, that uncertainty comes at the cost of offenders' freedom, and while no one suggests that a predator be released, legislatures and courts should strive to understand the clinical implications of their language.

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183. Dr. Sally Satel, psychiatrist and fellow at the American Enterprise Institute discussed this conceptual error with regard to Andrea Yates, the Houston mother convicted of killing her children. “The law is impervious to these subtleties. The jury’s directive . . . applies a mistaken conceptual framework to the mindset of a psychotic.” Sally Satel, Editorial, It’s Crazy to Execute the Insane, WALL ST. J., March 14, 2002, at A4.