



ACTS OF FEAR: AN ANALYSIS OF THE CONSTITUTIONALITY OF THE CIVIL COMMITMENT OF SEXUALLY VIOLENT PREDATORS

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I. Introduction

On April 5, 2005, by a vote of fifty-eight to two,¹ the New York State Senate passed a bill providing for the civil commitment of "sexually violent predators."² Since 1990, at least sixteen states and the District of Columbia have enacted new laws authorizing the civil confinement of convicted sex offenders after completion of their prison sentences.³ The United States Supreme Court certainly did not discourage states from enacting such special laws when it upheld the constitutionality of a typical statute, the Kansas Sexually Violent Predator Act in 1997.⁴ Yet there is little empirical support for the assumptions on which the Court's decision appears to rest. In practice, its standards for civil commitment of sexual offenders appear to be circular and do not offer a constitutionally adequate limiting principle to justify the civil commitment of sexual offenders on grounds different from those applicable to everyone else.

This article addresses the constitutionality of the civil commitment of sexually violent predators. First, it examines the precedent set by the civil commitment of the mentally ill as outlined in *O'Connor v. Donaldson* (1975), *Addington v. Texas* (1979) and *Foucha v. Louisiana* (1992). Next, the specific instance of sexually violent predator statutes is discussed in light of the recent decisions *Kansas v. Hendricks* (1997) and *Kansas v. Crane* (2002). Next it discusses whether the criteria of "mental illness" and "dangerousness" for civil commitment lay out enough of a limiting principle to render the acts constitutional. I conclude that sexually violent offenders do not constitute a unique threat that necessitates legislation beyond that outlined for the civil commitment of the mentally ill.

II. Sexually Violent Predators Civil Commitment Laws

Washington enacted the first of the recent civil commitment laws for sexually violent offenders after publicity surrounding child molestation.⁵ Like all these statutes, New York's proposed law is an effort to "protect the public from criminals likely to commit repeated acts of sexual violence."⁶ The sexual offender has been typically characterized in this kind of legislation as a "predator," unique threat, someone whose dangerousness is incurable and who relapses once freed from prison. Several authors note that fear is the motivation for these laws,⁷ and that sex offenders are "a criminal sub-population that historically inspired unique fear and disdain, and continues to do so today."⁸ Others point out the unique

"vehemence of the hatred for sex offenders" among the general public.⁹ One judge explained the Florida legislature's motivation for enacting its law as follows: "The very phrase 'sexually violent predator' is enough to instill fear in our hearts. An understandable reaction when faced with the spectre of a 'sexually violent predator' unrestrained in our neighborhood is to hope that our government will go to any lengths to prevent that person from harming individuals—especially children—in the future."¹⁰

Since the Fourteenth Amendment to the United States Constitution forbids states from depriving anyone of liberty without due process, any legislation curtailing liberty must comply with standards of substantive due process required by the Supreme Court.¹¹ Traditionally, civil commitment of sex offenders has been analogized to that of the mentally ill. Civil commitment laws allow the state to commit individuals to a secure hospital upon proof that the person is both mentally ill and dangerous.¹² The constitutional foundation for civil commitment and the justification for depriving an individual of liberty are that mental conditions make it difficult or impossible to control harmful behavior. So why create new and distinct statutes for sexually violent predators if civil commitment statutes covering dangerous, mentally ill persons are already in place?

Legislatures acknowledge that the civil commitment standards do not easily fit sexually violent predators. For example, the Kansas Sexually Violent Predators Act of 1994 begins by stating that it is designed to apply to a category of offenders distinct from than the mentally ill. (Its wording is identical to that found first in the Washington Act of 1990 and most recently in the proposed New York Act of 2005.) The Act's preamble states that "a small but extremely dangerous group of sexually violent predators exist who do not have a mental disease or defect that renders them appropriate for involuntary commitment."¹³ The New Jersey legislature enacted its law because it found that "the nature of the mental condition from which a sexually violent predator may suffer may not always lend itself to characterization under existing standards for mental commitment, 'although civil commitment may nonetheless be warranted due to the danger the person may pose to others as a result of the mental condition.'"¹⁴

These statutes use a broader definition of mental conditions than the general commitment laws in order to commit sexual predators. The fact that they adopt a broader standard is not inherently problematic. If, however, the definition of the mental condition depends on the fact of dangerous, then the standard

collapses into a single question of dangerousness, which has never been sufficient for civil commitment.

III. Constitutional Standards for Civil Commitment

The civil commitment of sexually violent predators has roots in the case law of the civil commitment of the mentally ill. *O'Connor v. Donaldson* (1997)¹⁵ was a landmark case which set out the circumstances under which such civil commitment could be constitutional. In 1975, the Supreme Court upheld Donaldson's claim that his involuntary civil commitment constituted a violation of his Fourteenth Amendment right to liberty because there was no showing that he posed a danger to anyone. This decision is commonly cited as the first to set out both mental illness and a finding of dangerousness as necessary constitutional predicates for civil commitment, however, the Court did not explicitly address the question of whether a non-dangerous mentally ill person may be involuntarily committed for the purpose of treatment. The majority opinion stated that "there is no reason now to decide whether mentally ill persons dangerous to themselves or to others have a right to treatment upon compulsory confinement by the State, or whether the State may compulsorily confine a nondangerous, mentally ill individual for the purpose of treatment."¹⁶ The ambiguity of this decision left a great deal of room for interpretation in the years that followed.

Four years later, *Addington v. Texas* (1979)¹⁷ affirmed that civil commitment deprivation of liberty must be justified by constitutional standards. The case was ostensibly about a procedural issue: the standard of proof the courts must use in determining whether the statutory criteria for civil commitment had been met.¹⁸ In declaring "clear and convincing evidence" as the standard of proof necessary for civil commitment of the mentally ill rather than the criminal standard, "beyond a reasonable doubt," the Court emphasized the civil nature of the proceeding, but also required a more demanding level of proof than that ordinarily used in civil cases, preponderance of the evidence, because of the importance of avoiding mistakes in confinement.

Perhaps the most important Supreme Court decision in civil commitment preceding *Hendricks* was delivered in *Foucha v. Louisiana* in 1992.¹⁹ This case concerned the constitutionality of a Louisiana statute that allowed the indefinite involuntary commitment of persons who were found not guilty by reason of insanity and deemed to be dangerous but not mentally ill. The question before the Supreme Court was whether involuntary commitment could be based on dangerousness alone. In a 5-4 decision, the Court argued it could not, and in doing so, affirmed the need for both dangerousness and mental illness as prerequisites for involuntary commitment.²⁰

While there is some agreement that mental illness and dangerousness are prerequisites for commitment, there is still considerable ambiguity about what exactly constitutes "mental illness" both legally and clinically. Justice Byron R. White, delivering the majority opinion in *Foucha*, reaffirmed the idea that both "mental illness" and "dangerousness" were necessary constitutional predicates for civil commitment. Justice Sandra Day O'Connor wrote in her concurrence that the state may

confine individuals who are deemed dangerous as long as there is "some medical justification" for doing so.²¹ Her opinion points to the fact that not all the Supreme Court justices necessarily agree on what exactly the mental illness standard should be. This ambiguity in the legal standard is related to, but distinct from, the problem of defining "mental illness" in the medical community, which is itself equally daunting.

The point to be taken from *Foucha* is that, even if there were a clear legal definition of "mental illness" (which there is not), the Court has used the terms "mental illness," "mental abnormality," and "some mental abnormality" in its sexually violent predator cases. Such a discrepancy in legal terminology speaks to the difficulty the Court has in specifically defining the criteria used to determine a person's inability to control his or her actions. Its use of different terms has led to confusion in appellate courts about the constitutionality of sexual predator statutes. For example, in *In re Blodgett* (1994),²² the Minnesota Supreme Court interpreted *Foucha* as not restricting mental disorders required for civil commitment to typical mental illnesses, and therefore upheld the constitutionality of the statute. (The Supreme Court denied Blodgett's petition for certiorari review.)

IV. Sexual Predator Cases: *Kansas v. Hendricks*

Recent rulings on sexual predator laws by the U.S. Supreme Court have decidedly broadened the category of who may be civilly committed, but claim to have done so in keeping with constitutional standards of "mental illness" and "dangerousness." In *Kansas v. Hendricks* (1997),²³ the Supreme Court found that a "mental abnormality" or "personality disorder" that is likely to make an individual engage in "predatory acts of sexual violence" sufficiently narrows the class of persons who may be subject to commitment. *Kansas v. Hendricks* was the first Supreme Court decision on a sexual predator law, the Kansas Sexually Violent Predator Act. The case involved Leroy Hendricks, a man who had admitted to taking "indecent liberties" with children on multiple occasions. In 1984, he was sentenced to 5-20 years in prison for pleading guilty to two counts of that charge. Ten years later, when he was scheduled to be released under parole, the State petitioned to have him confined under the Kansas Sexually Violent Predator Act.²⁴

The Kansas Sexually Violent Predator Act authorizes the indefinite confinement of a person convicted or accused of a violent sex crime who has a "mental abnormality" or "personality disorder" that makes the individual "likely to engage in predatory acts of sexual violence."²⁵ The act requires "a sex offense plus a mental condition that makes the person "likely" to commit further sexual offenses."²⁶ The Kansas Supreme Court, relying on *Foucha*, found the statute to be an illegal form of preventative detention. Kansas challenged the ruling by asserting its interest in treatment. Hendricks defended the Kansas Supreme Court's holding on the grounds that the statute was essentially criminal and so, as applied to him, imposed a second punishment in violation of the *Ex Post Facto* and Double Jeopardy clauses of the U.S. Constitution.²⁷ The Supreme Court held that Kansas's Sexually Violent Predator Act, on its face, met substantive due process requirements, was non-punitive, and thus did not violate the Double Jeopardy and *Ex Post Facto* clauses.

The Supreme Court, in its *Hendricks* decision, accepted the Kansas statute's broader terminology of "mental abnormality" or "personality disorder" as sufficient fulfillment of the mental illness standard set out in earlier decisions. Justice Clarence Thomas, delivering the majority opinion, claimed that courts have used various terms to describe those who are properly subject to confinement and that the term "mental illness" was "devoid of any talismanic significance."²⁸ However, in *Foucha*, the Court found that Foucha did not have a mental illness, even though he did have an antisocial personality disorder. This distinction was ignored in *Hendricks*. The fact that the Kansas statute was held to be constitutional, even though its standard was broader than the traditional characterization of mental illness, does not seem to be sufficient reason to reject it. The problem with the *Kansas* standard is that it was held to be constitutional without explicit recognition of the fact that "mental abnormality" is a broader category, and therefore without any explanation of the grounds on which it may be held to satisfy due process requirements.

V. The Circular Standard for Sexual Predators

The statutory requirement set out in *Hendricks* of a "mental abnormality" or "personality disorder" that is likely to make an individual reoffend could, in theory, sufficiently narrow the class of persons who may be subject to commitment. However, because the mental abnormalities of sexual predators are often defined by reference to behavior, the standard becomes circular and meaningless. The State's chief psychologist examined *Hendricks* and testified that he was not mentally ill²⁹ but was a pedophile,³⁰ and "likely" to repeat his inappropriate behavior with children if set free.³¹ The psychologist went on to testify that pedophilia is a "'mental abnormality' under the 'circular' definition of a person having a condition predisposing him to sexually violent offenses."³² If the specific "mental illnesses" which fulfill the mental illness standard used to confine sexually violent predators are diagnosed from the acts themselves, then the diagnosis is decidedly circular.

But, is it therefore irrelevant? In the majority opinion, Justice Thomas writes that: "A finding of dangerousness, standing alone, is ordinarily not a sufficient ground upon which to justify indefinite involuntary commitment. We have sustained civil commitment statutes when they have coupled proof of dangerousness with the proof of some additional factor, such as a 'mental illness' or 'mental abnormality.'"³³ But if, (in the case of pedophilia, for example) the determination of "mental illness" can be based entirely upon the same act that determines dangerousness, then actually, the dangerousness is really not tempered at all by the inclusion of a mental illness finding. Anyone who commits such acts might be diagnosed as having the disorder. Moreover, dangerousness is based on past acts and the likelihood of reoffence, which is determined by the "mental illness," making it circular.

The acts of exhibitionists and pedophiles make them likely to fulfill the psychiatric DSM-IV criteria³⁴ for exhibitionism and pedophilia, respectively, while rapists tend to have personality disorders.³⁵ A sexually violent predator can have multiple disorders. The issue is that few sexually violent predators, by virtue of the circularity of the diagnosis, can *not* be considered to have some sort of personality disorder or mental abnormality. The clinical diagnosis combines what the

legal standard separates. The legal standard seeks to use an individual's mental condition to explain why that person cannot refrain from violent behavior, whereas psychiatrists use past attacks to assign a diagnosis to the behavior. If the definition of one's mental condition depends on the fact of dangerousness, then the two-part standard collapses into a single standard of dangerousness alone, which has never been sufficient for civil commitment.

Hendricks was a pedophile whom the Court believed to be "compelled" by his mental abnormality to commit his crimes. The reason that mental illness is a legal standard for civil commitment is that it provides for an inability to control violent behavior that is a necessary addition to just a dangerousness finding. This separates people who are dangerous as a result of mental illness from dangerous criminals who could be convicted of a crime, and also from ordinary people who might possibly commit violence in the future, but cannot be constitutionally confined before committing a crime.

If mental illness is not a sufficient limiting principle, perhaps lack of control itself is. The Supreme Court perhaps thought it was clarifying matters by revealing the link between the mental condition and the lack of control. In *Kansas v. Crane* (2002),³⁶ the Supreme Court decided that a determination of lack of control is necessary to civilly commit sexually violent predators. In 1993, Michael Crane entered a tanning salon in Johnson County, Kansas, and exposed himself to the 19-year old female attendant. Half an hour later, he repeated this action in front of a 20-year old female clerk in a video store, this time threatening to rape her and demanding that she perform oral sex on him. He was sentenced to thirty-five years to life in prison for the two acts but, after various reversals and plea bargains, was released from prison five years later. The State then sought to have Crane civilly committed under the Kansas Sexually Violent Predator Act. Appearing before the Supreme Court, Crane argued that the *Hendricks* decision required the state to show that a person was completely unable to control his or her behavior (the Kansas Supreme Court had agreed with Crane's contention). The State maintained that *Hendricks* did not require a separate showing of inability to control behavior, merely required that the person engaged in harmful conduct because of a mental abnormality or personality disorder.

Justice Stephen G. Breyer, delivering the majority opinion, wrote, "In *Hendricks*, we did not give to the phrase 'lack of control' a particularly narrow or technical meaning.... It is enough to say that there must be proof of serious difficulty in controlling behavior."³⁷ The Court said that since even the most extreme sexual predator retains some element of control, insistence on a standard of absolute lack of control would not allow for the confinement of any sexual predators.³⁸ The ruling in *Crane* that "serious difficulty in controlling behavior" is required suggests that the Court may have been looking for a way to curtail the broad reach of *Hendricks*. Nationally, the number of sexually violent predators held in states with laws similar to the Kansas Act increased from 523 in August 1998 to 1200 in June 2001.³⁹ Could "lack of control" therefore be a sufficient limiting principle?

In *Kansas v. Hendricks*, *Hendricks* admitted to his inability to control his behavior.⁴⁰ However, without such an admission,

it is impossible to prove that someone cannot control (as opposed to “chose” not to control) his or her behavior. The lack of control standard fails to provide courts with any objective method to determine an individual’s ability to control his or her behavior. Therefore, while the standard itself is clearly defined, it is impossible to apply and thus is practically untenable. Indeed, the very fact that there is no scientific measure of whether an individual can control him or herself is what prompted removal of the volitional prong of the insanity defense during the insanity defense reform of the early 1980’s.⁴¹

VI. Evaluation of Dangerousness

If the mental abnormality and personality disorder standard depends on the same finding that determines dangerousness, then perhaps sexually predators are so dangerous that their unique brand of dangerousness is a sufficient limiting principle in and of itself. As mentioned above, the preamble to the Kansas Sexually Violent Predator Act partially grounds the need for a separate law in the legislature’s finding that “sexually violent predators’ likelihood of engaging in repeat acts of predatory sexual violence is high. The existing involuntary commitment procedure . . . is inadequate to address the risk these sexually violent predators pose to society.”⁴² Unfortunately, there is no good science to support this idea, as explained below.

It is difficult to predict dangerousness in any reliable fashion because dangerousness is measured by recidivism rates, which are skewed by outcome measures, follow-up periods, and low base rates.⁴³ Dangerousness of sexually violent predators is typically measured by recidivism rates, which are used to predict the likelihood that offenders will reoffend. The literature on recidivism rates is considerable and often conflicting. Recidivism can be defined in several ways, and recidivism rates are necessarily a function of the definition adopted.⁴⁴ The most common outcome measure is conviction of a crime, which has three major problems. First, sex offenses have reporting rates which are significantly lower than other offences. Second, reconviction excludes offenses that are not prosecuted. Third, many sex offenses are plea-bargained down to non-sexual offenses (such as assault). Therefore, reconviction is not a reliable measure of sex offender recidivism. There has also been no clear evidence that self reporting by sex offenders is a reliable measure of their likelihood to reoffend. The State psychologist in *Hendricks*, in agreement with the official position of the American Psychiatric Association (APA), argued that control is possible. Just as psychiatrists cannot predict that a “cured” alcoholic will reoffend, he argued, “simply by giving a diagnosis of pedophilia, you aren’t saying that a person would re-offend in the future.”⁴⁵

The current statutes clearly restrict the assessment of dangerousness to sexual recidivism. However, since mental abnormalities or personality disorders (especially the oft-cited antisocial personality disorder) can make a person prone to both sexual and non-sexual violent offences, sometimes sexual offenders will commit non-sexual violence. The literature seems to suggest that there are two classes of sex offenders: those that commit exclusively sex offences and those that commit both sexual and non-sexual offences. Impulsive offenders tend to commit both, whereas ritualistic offenders generally commit exclusively sex offences.⁴⁶ These classifications emphasize the importance of understanding the variability inherent to the general category of sex offender.

For example, rapists generally commit both sexual and non-sexual violent acts, whereas child molesters generally tend to limit their transgressions exclusively to sexual acts.⁴⁷ But even within a class, rates of recidivism can vary depending on the underlying motivation. Dividing child molesters in three subgroups (the intimate, aggressive, and criminal-opportunistic) show that recidivism rates vary with the subgroup.⁴⁸ It seems that in determining dangerousness, it is difficult to separate the sexually violent offenders clearly from the non-sexually violent offenders.

Just as outcome measures can influence recidivism rates, so can the selection of the follow-up period. Rates are naturally higher when the follow-up period is longer. While child molesters and rapists tend to have similar short-term recidivism rates, child molesters often have higher recidivism rates in the long term. A study using criminal charge as the outcome measure found rapists to have a recidivism rate of 9% at one year, and 39% in 25 years, while child molesters had a recidivism rate of 6% in one year, but 52% in 25 years.⁴⁹ Thus, predictions of future dangerousness may increase when long-term recidivism rates are used.

Even taking into consideration the issues with recidivism studies, there is little evidence to suggest that overall recidivism rates for sex offenders are higher than those for non-sex offenders. The Department of Justice published a report on the recidivism of sex offenders released from prison in 1994.⁵⁰ It measured rearrest, reconviction, and reimprisonment to determine recidivism over a three-year period. The report found that the recidivism rate among sex offenders was 5.3% for another sex crime and 43% for any crime. In contrast, the recidivism rate for non-sex offenders was 1.3% for a sex crime and 68% for any crime.⁵¹ Therefore, while it may be true that sex offenders have a higher recidivism rate for sex offences, they actually have lower recidivism rates for all crimes. A more sophisticated technique for determining recidivism rates is of the type of metaanalysis (which relies on a quantitative approach to synthesizing research results from similar studies to create more generalizable results) performed by Hanson and Bussiere.⁵² They measured recidivism as rearrest or reconviction within a 4-5 year follow-up period in 61 research studies. Across all the studies, the average recidivism rate for a sex offence was 13.4% and for either a sex offence or non-sexual violent offence was 25.6%.⁵³

A recidivism rate of 25% is not startlingly high. In fact, it can be described as a low base rate of recidivism.⁵⁴ Low base rates of recidivism tend to undermine predictive accuracy by creating false positives. When only a very small percentage of a group fulfills a requirement (like reoffending), there will be false positives. For example, even if a blood test for HIV were 99% accurate, if only one individual of a group of 1,000 people actually has HIV, then 1% of the 999 individuals without HIV (9.9 people) will be improperly identified as having HIV.

Not only is there a problem with recidivism rates, but predicting dangerousness in any individual is notoriously problematic.⁵⁵ The dangerousness of any individual is extremely difficult to predict. In an *amicus curiae* brief in *Tarasoff v. Regents of University of California* (1976),⁵⁶ the American Psychiatric Association (APA) argued that therapists are currently unable to reliably predict violent acts. Therapists tend to consistently overpredict violence and are more often

wrong than right. In another *amicus brief* in *Kansas v. Crane*, the APA noted that:

Where highly certain, imminent, grave harm is not at issue, prediction of reoffense is only a matter of general and uncertain probabilities. Likely recidivism, the best that can be done in circumstances like the present, would not meaningfully limit the class of individuals subject to preventative [sic] confinement.⁵⁷

It seems that in *Kansas v. Crane*, the Supreme Court allowed states to define an untenably broad category of individuals who could be lawfully civilly committed. One judge worried that “I cannot help but wonder where this novel approach to crime, punishment and public safety will lead us. How can we be sure. . . that the legislature will continue to view only sexual offenders as a special and unique class of criminals? If prosecutors are able to find mental health professionals willing to testify that people who commit repetitive assaults of a non-sexual nature have a mental abnormality predisposing them to such violent behavior, will the legislature pass laws to keep them incarcerated beyond their criminal sentences by the device of civil commitment? How about repeat perpetrators of domestic violence? Chronic drunk drivers? Violent drug offenders? What are the limits of this “end run” around the normal criminal justice process?”⁵⁸

VII. Conclusion

In determining the constitutionality of the civil commitment of a potentially dangerous sexually violent predator, the state must weigh its interest in preventing crime against depriving offenders of liberty. The magnitude of the potential harm must be considered.⁵⁹ The Supreme Court, in upholding the constitutionality of the Kansas Sexually Violent Predator Act, failed to create a clear standard of what constitutes either “dangerousness” or “mental illness.” In doing so, the Court did not place sufficient limits on who can be locked away indefinitely with or without committing a crime. Although it is still too early to ascertain how often these statutes will actually be applied, already over a thousand individuals have already been involuntarily committed under the various sexual

predator statutes in the United States.⁶⁰ Unlike prisoners with fixed prison terms, they are likely to remain confined indefinitely. Although the statutes typically require periodic review of commitments, sexual predators can remain confined as long as the state can show that they still have a mental abnormality and are dangerousness. The Court’s decisions in *Hendricks* and *Crane* have made it easier for the state to do so.

In its decisions, the Court may have assumed that it was clarifying standards for civil commitment in order to clearly define or limit the class of people subject to sexual predator laws. However, since the mental abnormalities of sex offenders are often defined solely by the acts which make them dangerous, for sex offenders, mental illness is an insufficient limiting principle. The mental abnormality standard appears to collapse into the dangerous standard. In *Kansas v. Crane*, the court makes explicit its concern with the link between mental illness and lack of control. But while the lack of control standard may appear to be more clearly defined than the mental abnormality/personality disorder standard, there is no objectively ascertainable manner of determining lack of control, and therefore this standard is insufficient as well. The extreme dangerousness of sexually violent predators might offer a limiting principle. The available evidence, however, does not support the assumption that sexually violent predators are “more dangerous” than other violent criminals in any measurable way, so this too is an inadequate limiting principle.

If the civil commitment statutes seem not to have limiting principles that make them constitutional, why are any states considering their adoption? Supporters of these statutes claim that they are trying to protect the public from the uniquely dangerous sexually violent predator, but as discussed above, the evidence for any unique propensity for violence is equivocal at best. Perhaps the desire to lock away those few individuals whose sexual preferences deviate from our own has taken precedence over the careful consideration of what facilitating such incarceration could mean. Fear of the sexual predator may be as much about fears of “deviant” sexual drives as it is about fear of violence. However, fear has never been and should not be enough to supplant the necessity for constitutional justifications for deprivations of liberty.

Endnotes

¹ Joseph L. Bruno, “Senate Passes Bill to Keep Sexual Predators Off the Streets,” 28 April 2004, available at: << <http://www.senate.state.ny.us/pressreleases.nsf/0/8f9293757d96a82b85256e84005aee53?OpenDocument>>>.

² Civil Commitment of Sexually Violent Predators, New York State Senate, S.3273, 9 May 2005, available at: <<<http://assembly.state.ny.us/leg/?bn=S03273&sh=t>>>.

³ As of April 2005, sixteen states and the District of Columbia have civil commitment laws for “sexual predators.” The states are: Arizona, California, Florida, Illinois, Iowa, Kansas, Massachusetts, Minnesota, Missouri, New Jersey, North Dakota, South Carolina, Texas, Virginia, Washington, and Wisconsin. National Center for Prosecution of Child Abuse; Julia C. Walker, “Freedom Is to Confinement as Twilight Is to Dusk: The Unfortunate Logic of Sexual Predator Statutes,” 67 *Missouri Law Review* 993, 1001-1002 (2002).

⁴ *Kansas v. Hendricks*, 521 U.S. 346 (1997).

⁵ Washington Community Protection Act, Wash. Rev. Code §71.09.010 *et seq.* (1992).

⁶ Bruno.

⁷ Nathaniel E. Plucker, “Note: Debating the End of the World and Other Pointless Endeavors: *Thomas v. State* and the Civil Commitment of Sex Offenders in Missouri after *Kansas v. Crane*,” 47 *St. Louis Law Journal* 1151 (2003).

⁸ Eric S. Janus and Wayne A. Logan, “Substantive Due Process and the Involuntary Confinement of Sexually Violent Predators,” 35 *Connecticut Law Review* 319, 320 (2003).

⁹ Adam Sampson, *Acts of Abuse: Sex Offenders and the Criminal Justice System* 124 (1994)

¹⁰ *Westerheide v. State*, 831 So. 2d 93,120 (Fla. 2000) (Pariente, J., concurring in part and dissenting in part.)

¹¹ *Addington v. Texas* 441 U.S. 418 (1979).

¹² *Addington v. Texas* 441 U.S. 418 (1979). For a well-reasoned argument of how the Kansas Sexually Violent Predator Act is really a criminal act in

nature, see the APA Brief *Amicus Curiae* to the Supreme Court in *Kansas v. Hendricks*, 1996 WL 469200. However, *Seling v. Young*, 531 U.S. 250 (2001) found that sexual predator laws are civil, not criminal. Regardless of the merits of the criminal argument, if the civil commitment of sexually violent predators is to be constitutionally valid, it must be justified in civil law terms.

¹³ Kansas Sexually Violent Predator Act, Kan. Stat. Ann. §59.29a01 *et seq.* (1994).

¹⁴ *In re Commitment of WZ*, 173 N.J. 109, 119-120 (2002), with the court quoting from the New Jersey Sexual Predator Act, N.J.S.A. 30:4-27.25b.

¹⁵ *O'Connor v. Donaldson* 422 U.S. 563 (1975).

¹⁶ *O'Connor v. Donaldson* at 573.

¹⁷ *Addington v. Texas* 441 U.S. 418 (1979).

¹⁸ See *Addington v. Texas* also brought up the issue of whether the involuntary commitment of sexual predators is justified through a police power or *parens patriae* rationale. This issue, and the connected issue of right to treatment, are beyond the scope of this paper since they speak mostly to the question of whether the acts are really criminal in nature.

¹⁹ *Foucha v. Louisiana* 504 U.S. 71 (1992)

²⁰ Lynda E. Frost and Richard J. Bonnie, eds. *The Evolution of Mental Health Law* 42 (2001).

²¹ *Foucha v. Louisiana* 504 U.S. 71 (1992) at 1790

²² *In re Blodgett*, 510 NW.2d (Minn. 1994).

²³ *Kansas v. Hendricks* 521 U.S. 346, 358 (1997).

²⁴ Kansas Sexually Violent Predator Act

²⁵ Kansas Sexually Violent Predator Act

²⁶ APA Brief *Amicus Curiae* to the Supreme Court in *Kansas v. Hendricks*, 1996 WL 469200.

²⁷ The *Ex Post Facto* clause “forbids the application of any new punitive measure to a crime already consummated.” *Hendricks*, 521 U.S. 346 (1997), U.S. Const., art. I, § 10. The double jeopardy clause prevents the state from “punishing twice, or attempting a second time to punish criminally, for the same offense.” APA Brief *Amicus Curiae* to the Supreme Court in *Kansas v. Hendricks*, 1996 WL 469200 AT 2085; U.S. Const., amen. 5.

²⁸ *Kansas v. Hendricks* 521 U.S. 346 (1997)

²⁹ *Kansas v. Hendricks* 521 U.S. 346 (1997) at 356, 360.

³⁰ *Kansas v. Hendricks* 521 U.S. 346 (1997) at 360.

³¹ *Kansas v. Hendricks* 521 U.S. 346 (1997) at 376.

³² APA Brief *Amicus Curiae* to the Supreme Court in *Kansas v. Hendricks*, 1996 WL 469200.

³³ *Kansas v. Hendricks* 521 U.S. 346, 358 (1997)

³⁴ American Psychiatric Association. *Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition* (2000). This is the standard reference for diagnostic criteria for mental disorders, published by the American Psychiatric Association, Washington D.C.

³⁵ Vernon Quinsey et al. *Violent Offenders: Appraising and Managing Risk*, 119-137 (1998).

³⁶ *Kansas v. Crane* 534 U.S. 407 (2002).

³⁷ *Kansas v. Crane* 534 U.S. 407 (2002) at 413.

³⁸ *Kansas v. Crane* 534 U.S. 407 (2002) at 412.

³⁹ Peter Pfaffenthor, “The Need for Coherence: State’s Civil Commitment of Sex Offenders in the Wake of *Kansas v. Crane*,” 55 *Stanford Law Review* 2242 (2003).

⁴⁰ “[Hendricks] explained that when he gets “stressed out,” he is unable to control the urge to engage in sexual activity with a child. Hendricks agreed that he is a pedophile and that he is not cured of the condition. Petition Appeal 3a; see J.A. 125-91. (Although Kansas intimates otherwise, Hendricks did not testify that he would reoffend if released.)” APA Brief *Amicus Curiae* to the Supreme Court in *Kansas v. Hendricks*, 1996 WL 469200.

⁴¹ Stephen J. Morse, “Uncontrollable urges and irrational people,” 88 *Virginia Law Review* 1025 (2002).

⁴² Kansas Sexually Violent Predator Act

⁴³ R. Karl Hanson, “What Do We Know About Sex Offender Risk Assessment?” 4 *Psychology, Public Policy & Law* 50, 68 (1998).

⁴⁴ Vernon Quinsey et. al, “Sexual Predators and Social Policy,” 23 *Crime and Justice* 43, 99 (1998).

⁴⁵ APA Brief *Amicus Curiae* to the Supreme Court in *Kansas v. Hendricks*, 1996 WL 469200.

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⁴⁸ David Canter et al. “Paedophilia: Pathology, Criminality or Both? The Development of a Multivariate Model of Behavior in Child Sexual Abuse,” 9 *The Journal of Forensic Psychiatry* 532 (1998).

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⁵⁴ Quinsey et al., 120.

⁵⁵ See J. Monahan et al., *Rethinking Risk Assessment: The MacArthur Study of Mental Disorder and Violence*. (2001).

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