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**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***

I. INTRODUCTION

David Siebers served ten years for rape and armed robbery in Michigan.<sup>1</sup> Just months after being released, he was caught trying to lure a ten year old girl into his car with candy.<sup>2</sup> Siebers was released from prison the second time in September 2002, and since then has been forced to live in four different states because of both government and public harassment.<sup>3</sup> Since moving to New Mexico, Siebers has been under constant surveillance by local police upon orders of the mayor, had signs posted on a fence near where he lives that read “Go back where you came from – Hell,” and has been physically assaulted while doing yard work.<sup>4</sup> The mayor of Albuquerque, who ordered police surveillance, justified the action by saying that an FBI profile showed that Siebers continues to be dangerous and “*will re-offend.*”<sup>5</sup>

Siebers represents the inherent problems with society’s struggle in dealing with sex offenders. His situation illustrates both the patchwork manner in which different states have dealt with the perceived continuing threat posed by sex offenders and the inherent problems such a system creates, both for the public at large and those previously convicted of sexual offenses.

The general public’s fear of convicted sex offenders has resulted in legislatures being pushed hard to enact serious restraints and controls against a group of individuals deemed dangerous to civilized society, particularly to women and children. The most prominent example of this trend is the institution of “Megan’s Law” in numerous states, mandating that neighborhoods and local police officials be informed of the presence of a sex

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1. *Sex Offender Run Out of 4 States*, CNN.com, Jan. 16, 2002 available at <http://www.cnn.com/2003/US/Southwest/01/16/sex.offender.ap/index.html> (last visited Jan. 16, 2002).

2. *Id.*

3. *Id.* Siebers originally resided in Michigan upon his release from prison, then moved to Ohio, where police bought him a bus ticket to Kentucky. *Id.* He has since moved in his trailer to rural New Mexico. *Id.*

4. *Sex Offender Run Out of 4 States*, *supra* note 1.

5. *Id.* (emphasis added).

offender residing in a community.<sup>6</sup> This type of governmental action only makes the public aware of the presence of such a threat. Sixteen states have moved to more punitive and restrictive measures to protect society from the threat of sexual predators, namely civil commitment of convicted sex offenders.

The most prominent player in this new movement has been the state of Kansas, which twice has had cases challenging its statute<sup>7</sup> taken to the Supreme Court of the United States. In the first case, *Kansas v. Hendricks*,<sup>8</sup> the Supreme Court upheld the constitutionality of such statutes, finding that the statute in question dealt with a civil, not criminal act, and did not violate the double jeopardy or ex post facto lawmaking clause of the Constitution.<sup>9</sup> The Court further decided that the requirements for commitment in the Kansas statute were sufficient to rebut any claims of violation of substantive due process requirements.<sup>10</sup> Having upheld the constitutionality of these commitment actions, states then returned to the task of implementing their statutes in light of *Hendricks*. It was the battle over this implementation in Kansas that led to the Supreme Court reaffirming *Hendricks* in *Kansas v. Crane*.<sup>11</sup>

In *Crane*, the state of Kansas moved to have Michael Crane committed under the Kansas Sexually Violent Predator Act.<sup>12</sup> A Kansas District Court ordered Crane committed for “treatment” after a trial,<sup>13</sup> but the Kansas Supreme Court reversed this decision, holding that the Kansas and United

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6. Megan’s Laws began in New Jersey and mandate that convicted sex offenders register with local authorities and that communities be informed of a sex offender living in their neighborhood. Daniel M. Filler, *Making the Case for Megan’s Law: A Study in Legislative Rhetoric*, 76 IND. L.J. 315, 315 (2001) (tracing the development of the legislative processes that have led to the creation of such statutes).

7. KAN. STAT. ANN. art. 29a, §§ 59-29a01– 59-29a20 (Supp. 2002). The Kansas Legislature passed the Kansas Sexually Violent Predator Act in 1994. The Act called for the commitment of sexually violent predators in light of their likelihood “to engage in repeat acts of sexual violence if not treated for their mental abnormality or personality disorder . . . [and] to address the special needs of sexually violent predators and the risks they present to society . . . .” *Id.* at § 59-29a01. Subsequent sections of the Act describe how sexual predators are to be identified, how civil commitment proceedings will be conducted, and how confinement of sexual predators must proceed. *Id.* at §§ 59-29a02 – 59-29a20.

8. 521 U.S. 346 (1997). This case dealt with the commitment of Leroy Hendricks, a Kansas man convicted of molesting two young boys. *Id.* at 353. For a complete discussion of this case, see *infra* Section III, Part A.

9. *Hendricks*, 521 U.S. at 369-370.

10. *Id.* at 360.

11. 534 U.S. 407 (2002).

12. *Id.* at 410-11. Crane was diagnosed by a state psychiatrist as suffering from both exhibitionism and antisocial personality disorder. *Id.* at 411. For a complete discussion of this case, see *infra* Section III, Part B.

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

States Constitutions require “a finding that the defendant cannot control his dangerous behavior” for such a commitment to be legal.<sup>14</sup> The United States Supreme Court in *Crane* vacated the Kansas Supreme Court decision that the state must prove the offender has a total or complete lack of control in order to be committed.<sup>15</sup> To prevent this type of abuse, *Crane* established a distinction between “the dangerous sexual offender whose serious mental illness, abnormality, or disorder subjects him to civil commitment” and “the dangerous but typical recidivist convicted in an ordinary criminal case.”<sup>16</sup> The *Crane* Court was very concerned with the possibility that civil commitment could “become a ‘mechanism for retribution or general deterrence’” instead of a mechanism for sex offender treatment.<sup>17</sup> Punishment for the Court is a function of criminal law, not civil commitment.

*Crane* not only affected Kansas, but also every state with a sexually violent predator statute, including Missouri.<sup>18</sup> Fewer than four months after the *Crane* decision, in May of 2002, the Missouri Supreme Court handed down its interpretation of *Crane*’s “serious difficulty in controlling behavior” requirement in *Thomas v. State*.<sup>19</sup> The day before his scheduled release from prison, the state of Missouri filed a petition to commit him as a sexual offender.<sup>20</sup> A jury trial of eight individuals found that the state had established that Thomas was a sexually violent predator and ordered him committed.<sup>21</sup> Thomas appealed this commitment order based on his argument that the statute itself was unconstitutional and that the instructions given to the jury were inadequate under both *Hendricks* and *Crane*.<sup>22</sup>

The Missouri Supreme Court decided that *Crane* requires an explicit jury instruction on the level of difficulty in controlling behavior.<sup>23</sup> This

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14. *Id.* (citing *In re Crane*, 7 P.3d 285, 286-88, 290 (Kan. 2000)).

15. *Id.* at 411, 415.

16. *Id.* at 413 (citing *Hendricks*, 521 U.S. at 357-58).

17. *Id.* at 412 (citing *Hendricks*, 521 U.S. at 372-73 (Kennedy, J., concurrence)).

18. Missouri’s sexual predator law reads similarly to the one from Kansas. It allows for the civil commitment of “any person who suffers from a mental abnormality which makes the person more likely than not to engage in predatory acts of sexual violence if not confined in a secure facility.” MO. REV. STAT. § 632.480 (1999).

19. 74 S.W.3d 789 (Mo. 2002). Eddie Thomas was convicted in 1982 of multiple sexually violent offenses. *Id.* at 790. For a complete discussion of this case, see *infra* Section IV, Part A.

20. *Thomas*, 74 S.W.3d at 790.

21. *Id.*

22. *Id.* Thomas’s case was considered along with the case of Desi Edwards, a convicted child rapist who was targeted for commitment after being returned to prison for a parole violation involving the use of alcohol. *Id.*

23. *Id.* at 792. The Court laid out the following instruction that must be given in these cases: “As used in this instruction, ‘mental abnormality’ means a congenital or acquired condition affecting the emotional or volitional capacity that predisposes the person to commit sexually violent offenses in a degree *that causes the individual serious difficulty in controlling his behavior.*” *Thomas*, 74 S.W.3d at 792.

requirement of a specific jury instruction on this issue is one that has been rejected by numerous other states with similar civil commitment statutes.<sup>24</sup> Indeed, Chief Justice Limbaugh of the Missouri Supreme Court took the opposite position in his dissenting opinion, believing instead that “the given instruction, though couched in different language, necessarily required that same ‘proof of serious difficulty in controlling behavior.’”<sup>25</sup> This conflict over jury instructions is at the heart of the difficulties with the *Crane* decision. Justice Scalia, in his dissent in *Crane*, identified this problem as necessarily resulting from the majority’s decision. As he asked, “[h]ow is one to frame for a jury the degree of ‘inability to control’ which, in the particular case, ‘the nature of the psychiatric diagnosis, and the severity of the mental abnormality’ require?”<sup>26</sup> While Justice Scalia keenly identified the coming split amongst the states in interpreting *Crane*, his dissent also provided sufficient support for Missouri and other courts that have mandated a specific jury instruction on lack of control. Scalia’s entire line of argument shows the validity of the *Thomas* approach and why *Crane* requires an explicit jury instruction on inability to control behavior.

Section II of this Note will begin with a look at the history of civil commitment of sexual offenders and the debate over the purpose and constitutionality of these statutes, focusing on the motivations and justifications for such laws and criticisms of the necessity and effectiveness of such measures. Section III will consist of an in-depth analysis of the Supreme Court’s decisions in *Hendricks* and *Crane* and will lay a foundation for an analysis of Missouri’s sexually violent predator law and the state Supreme Court’s decision in *Thomas*. The analysis of *Thomas* will be completed in Section IV and will be compared with other states’ interpretation of *Crane*. Finally, in Section V, an analysis of the *Thomas* approach will be conducted. By looking at both Missouri commitment cases subsequent to *Thomas* and collateral issues dealing with commitment, this Note will conclude that the dispute over jury instructions is a minor sideshow at best. Ultimately,

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24. See *In re Westerheide*, 831 So. 2d 93, 109 (Fla. 2002) (finding instructions that required jury to find serious difficulty without using such words acceptable); *In re Commitment of John Lee Laxton*, 647 N.W.2d 784 (Wis. 2002) (finding a “nexus” between individual’s dangerousness and mental disorder enough to satisfy *Crane*); *People v. Hancock*, 771 N.E.2d 459, 465 (Ill. App. Ct. 2002) (finding nature and severity of mental disorder in sexual predator cases enough to satisfy constitutional standards); *In re Dutil*, 768 N.E.2d 1055, 1058 (Mass. 2002) (finding mental disorder and lack of control implicit in current jury instructions). But see *In re Detention of Barnes*, 658 N.W.2d 98, 101 (Iowa 2003) (finding that the jury instruction on the term “mental abnormality” was inadequate because it did not require a showing of serious difficulty in controlling behavior and adopting the instruction laid out by the Missouri Supreme Court in *Thomas*). For a complete discussion of these cases, see *infra* Section IV, Part B.

25. *Thomas*, 74 S.W.3d at 792 (Limbaugh, J., dissenting).

26. *Kansas v. Crane*, 534 U.S. 407, 423 (2002) (Scalia, J., dissenting). Justice Thomas, who wrote the majority opinion in *Hendricks*, joined in this dissent.

requiring an instruction on difficulty in controlling behavior does not affect the fear of sexual offenders that continues to drive the creation of such statutes and almost universally guarantees the civil commitment of convicted sex offenders by a jury of eight average citizens.

## II. CIVIL COMMITMENT – HISTORY, JUSTIFICATION AND EFFECTIVENESS

Having a historical understanding of the development of this area of law and some of the scientific evidence provides a unique insight into the motivation for sexually violent predator laws. This section will examine other governmental actions that deal with the “problem” of sexual offenders besides sexually violent predator laws, analyze the history of commitment proceedings in this century, and compare the scientific arguments regarding the sensibility and fairness of civil commitment of sex offenders.

### A. “Megan’s Law” and Registration of Sex Offenders

The murder of Megan Kanka in 1994 prompted the first round of registration and community notification laws dealing with sex offenders.<sup>27</sup> Megan was raped and murdered by her neighbor Jesse Timmendequas, who was twice convicted for sexual offenses involving minors. Timmendequas luring her to her death with the promise of seeing a puppy.<sup>28</sup> Megan’s parents then began a public campaign to get the state legislature to pass a community notification law. Their efforts resulted in New Jersey quickly passing the first of what were to become known as “Megan’s Laws.”<sup>29</sup> By 1996 Congress had taken measures to require every state to adopt community notification measures, and today every state has some version of Megan’s Law.<sup>30</sup> These laws were designed to deal with a growing national concern about habitual sex offenders, and provide society with “a feeling of safety and offer[ing] citizens a chance to conduct their lives accordingly.”<sup>31</sup> These laws indeed meet the goal of increasing society’s perception of safety, but at the same time raise serious concerns about the rights, treatment, and even safety of men and women labeled as society’s newest outcasts—the sex offender.<sup>32</sup>

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27. Leora Sedaghati, *Megan’s Law: Does it Serve to Protect the Community or Punish and Brand Sex Offenders?*, 3 J. LEGAL ADVOC. & PRAC. 27, 27 (2001).

28. *Id.*

29. Filler, *supra* note 6, at 315-16.

30. *Id.* at 316.

31. Sedaghati, *supra* note 27, at 27.

32. See Alex B. Eyssen, *Does Community Notification for Sex Offenders Violate the Eighth Amendment’s Prohibition Against Cruel and Unusual Punishment? A Focus on Vigilantism Resulting From “Megan’s Law,”* 33 ST. MARY’S L.J. 101 (2001) (arguing that such laws add little additional benefits to the public and offer little assistance to communities in dealing with sex offenders personally known to their victims and urging government officials to be proactive in preventing vigilantism against sex offenders).

### B. *Historical Development of Sex Offender Laws*

To put the current developments of sexual offender laws in a proper context, it is necessary to examine past societal attempts to manage sexual offenders. Perhaps the best description of the twentieth century treatment of sex offenders is that offered by Samuel Brakel and James Cavanaugh, who have described this history as involving the so-called “pendulum effect.”<sup>33</sup> Brakel and Cavanaugh have broken down approaches to dealing with sex offenders in the twentieth century into four distinct periods: (1) undifferentiated treatment; (2) rehabilitation; (3) a return to undifferentiated treatment; and (4) the modern approach.<sup>34</sup> A brief summary of each of these periods amply demonstrates that the current batch of sexually violent predator laws is not a new development or innovation, but rather a method of control and problem resolution attempted unsuccessfully in our recent past.

Brakel and Cavanaugh identify the first period as that of “undifferentiated treatment,” dating up to approximately 1930.<sup>35</sup> During this period, sex offenders were treated like most other criminals. Criminal convictions were sought and incarceration was the accepted punishment, with the hope that the specific offender and potential other offenders would be deterred from such actions in the future.<sup>36</sup> After the 1930s, a new approach to sexual offenders began to emerge, with a new emphasis on rehabilitation and treatment of the sex offender.<sup>37</sup> Sexually deviant behavior was separated for legal purposes from other types of criminal behavior to exact the rehabilitation and treatment purpose.<sup>38</sup> This period was to be the “heyday of the sexual psychopath laws.”<sup>39</sup>

The rehabilitation period’s crowning endorsement can be traced to a 1940 Supreme Court decision, *Pearson v. Probate Court*, upholding the constitutionality of the newly created statutes that called for separate treatment of sex offenders.<sup>40</sup> Brakel and Cavanaugh state that that decision:

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33. Samuel J. Brakel & James L. Cavanaugh, *Of Psychopaths and Pendulums: Legal and Psychiatric Treatment of Sex Offenders in the United States*, 30 N.M. L. REV. 69, 69 (2000).

34. *Id.* at 69-77.

35. *Id.* at 70.

36. *Id.*

37. *Id.* at 71.

38. Brakel & Cavanaugh, *supra* note 33, at 71.

39. *Id.* at 70-71.

40. *Minnesota ex rel. Pearson v. Probate Court*, 309 U.S. 270 (1940) (upholding a Minnesota statute as both significantly narrow in constitutional terms and finding that it did not implicate equal protection concerns). It is interesting to note that Brakel and Cavanaugh were critical of this decision because “[i]t simply said—in a classic case of substituting conclusion for argument—that there was ‘no reason for doubt’ that the legislature’s selection of the targeted class had a ‘rational basis.’” Brakel & Cavanaugh, *supra* note 33, at 71. Evidence of such circular logic is also found in later Supreme Court cases dealing with sex offender statutes and

[R]eflected, as well as bolstered, the general optimism that prevailed in relevant circles about the ability to identify and treat those among the amorphous aggregation of sex offenders who would benefit from the ministrations of the sexual psychopath laws.<sup>41</sup>

By the 1950s, more than half of the states had passed similar measures and were processing hundreds of sex offenders through these statutes each year.<sup>42</sup>

Brakel and Cavanaugh attribute the success of these laws and efforts to the substantial consensus that existed amongst the law and psychiatry as to the mechanisms and objectives of the sex offender acts enacted by the states.<sup>43</sup> The “rehabilitative ideal” was an idea held generally by members of both professions, and “its implementation via indeterminate institutionalization in treatment facilities in lieu of imprisonment went essentially unchallenged.”<sup>44</sup> A number of developments led to the downfall of these statutes. First, practical experience and scientific theory undercut the idea that sexual psychopaths could be rationally distinguished from others exhibiting deviant behavior and successfully treated.<sup>45</sup> Second, a societal shift occurred, placing more of an emphasis on “law and order” issues and calling for the adoption of a more punitive approach to criminal offenders.<sup>46</sup> These developments caused more than half of the states to get rid of the sex offender statutes by the mid-1980s and the remaining five states with sexually violent predator laws used these laws so infrequently that they virtually did not exist.<sup>47</sup>

A decision by the Supreme Court would sound the death knell of these efforts and mark the beginning of the third period Brakel and Cavanaugh identify.<sup>48</sup> In *Specht v. Patterson*, the Court mandated the use of almost all procedural safeguards guaranteed to criminal defendants in commitment proceedings.<sup>49</sup> This decision, combined with the increasing questions about the effectiveness of treatment, resulted in a return to the pre-1930s

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may speak to inherent difficulties for justifying the unequal treatment of sex offenders. *See infra* text accompanying note 119.

41. Brakel & Cavanaugh, *supra* note 33, at 71.

42. *Id.* at 71-72. In the mid-1960s, California was committing sex offenders at the rate of approximately 800 offenders per calendar year. *Id.*

43. *Id.* at 72.

44. *Id.*

45. Brakel & Cavanaugh, *supra* note 33, at 73.

46. *Id.*

47. *Id.* The five states were Massachusetts, Nebraska, New Jersey, Oregon and Washington. *Id.*

48. *Specht v. Patterson*, 386 U.S. 605 (1967) (dismissing Colorado’s argument that its version of the law was civil in nature and a type of sentencing decision, and instead requiring the institution of significant procedural safeguards usually found in criminal trials).

49. Brakel & Cavanaugh, *supra* note 33, at 73-74. These rights included a judicial hearing, assistance of counsel, the confrontation clause of the Sixth Amendment, the right to present witnesses and evidence, and the right to an appeal. *Id.*



undifferentiated treatment from other types of criminal offenders.<sup>50</sup> In the 1990s, a new rash of highly publicized cases of sexually violent crimes against children recreated the impetus for the current set of sexual offender commitment statutes that emerged in the states beginning in the early 1990s, the modern or final period identified by Brakel and Cavanaugh.<sup>51</sup>

The earliest example of a highly publicized sexually violent crime against a child occurred in Washington in 1989.<sup>52</sup> At that time, Earl Shriner, a recently released sex offender who had been serving time for the kidnapping and sexual assault of two teenage girls, raped a seven-year-old boy and cut off the boy's genitals, leaving him to die.<sup>53</sup> This heinous crime has been directly attributed to the public outcry that led Washington's legislators to pass the first in a new line of sex offender laws.<sup>54</sup>

### C. *Scientific Studies on Sexual Offender Recidivism and Treatment*

The debate on the danger posed by convicted sex offenders, like most debates, has two sides. Dennis Doren, a frequent state expert witness in civil commitment cases, believes that sexual recidivism for a certain group of offenders is a rather common occurrence and that such repeat conduct is currently under-reported.<sup>55</sup> Doren argues that numerous factors, such as a focus on convictions as opposed to accusations, limited timelines of analysis, unreported crimes, and the ignoring of females as sex offenders, have all contributed to the under-reporting and estimation of recidivism rates among past sex offenders.<sup>56</sup> According to Doren's analysis and research, recidivism for child molesters can be estimated conservatively at fifty-two percent, and the conservative estimate for rapists is approximately forty percent.<sup>57</sup> As he states, these figures show that "sex offender recidivism is far more than a rare event" as previous clinical studies have indicated, and the rates he has established are such that "discriminating characteristics between recidivists and non-recidivists may be useful in the differential prediction of which offenders are likely to commit new sexual crimes and which are not."<sup>58</sup>

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50. *Id.* at 74.

51. *Id.* at 74-75. For a discussion of some of these states, see *infra* Section IV, Part B.

52. Brakel & Cavanaugh, *supra* note 33, at 75.

53. *Id.*

54. *Id.*

55. Dennis M. Doren, *Recidivism Base Rates, Predictions of Sex Offender Recidivism, and the 'Sexual Predator' Commitment Laws*, 16 BEHAV. SCI. & LAW 97 (1998).

56. *Id.* at 99-100.

57. *Id.* at 108.

58. *Id.*

Others who have evaluated the topic of sex offender recidivism take issue with the high rates that Doren has cited.<sup>59</sup> The impression left by reading studies in this field is that the varying types of offenders who are subject to commitment under sexual predator statutes may re-offend in very different manners and at very different rates. A good example of this dichotomy is the comparative studies, which have been done on recidivism of rapists and child molesters. Studies of rapists have found a higher risk of relapse into violent behavior in the short term, while analysis of child molesters has revealed a much longer period in which an offender might re-engage in high-risk sexual behavior and a lesser ability to resist deviant sexual urges.<sup>60</sup> Likewise, studies on the behavior of rapists have found quite different motivations for deviant sexual acts that result in differing abilities to control behavior.<sup>61</sup> Some sex offenders in this area arguably are driven to deviant behavior by poor impulse control exhibited in a variety of behaviors, while others commit sexual assaults as part of a criminal lifestyle incorporating frequent expressions of aggression and control.<sup>62</sup> Behaviorists studying this phenomenon have argued that these variances among sex offenders should be taken into account in designing programs of treatment and methods of preventing sexual predators from lapsing into deviant behavior.<sup>63</sup> The uncertainty of this area, combined with the difficulties of assessment systems employed by states in assessing sex offenders under their sexual predator statutes, have led some to conclude that the current risk-assessment procedures that are vital to commitment proceedings are so deficient that they undermine the validity of expert testimony on the subject in a legal proceeding.<sup>64</sup>

Leonore Simon has taken this argument one step further, arguing that studies show that sex offenders are neither specialists in sex crimes nor mentally disordered.<sup>65</sup> The implications of such findings in the realm of sexual predator laws are apparent. As Simon argues, “legal and mental health professionals continue to operate on the assumption that offenders who commit sex crimes are mentally disordered, treatable, dangerous (if not treated), and at

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59. See Richard Wollert, *Adversarial Forum: An Analysis of the Argument That Clinicians Under-Predict Sexual Violence in Civil Commitment Cases*, 19 BEHAV. SCI. & LAW 171 (2001) (arguing that Doren’s conclusions are based on untenable assertions).

60. Timothy J. McGuire, *Correctional Institution Based Sex Offender Treatment: A Lapse Behavior Study*, 18 BEHAV. SCI. & LAW 57, 60 (2000).

61. *Id.* at 61.

62. *Id.*

63. *Id.* (arguing that greater attention needs to be paid to the early signs of lapse behavior that are unique to different types of offenders to prevent recidivism).

64. Terence W. Campbell, *Sexual Predator Evaluations and Phrenology: Considering Issues of Evidentiary Reliability*, 18 BEHAV. SCI. & LAW 111 (2000).

65. Leonore M.J. Simon, *An Examination of the Assumptions of Specialization, Mental Disorder, and Dangerousness in Sex Offenders*, 18 BEHAV. SCI. & LAW 275 (2000).

high risk to reoffend with another sex crime.”<sup>66</sup> These mistaken assumptions result in an overly exclusive focus on sex offenders, which he believes lulls the public into a false sense of security.<sup>67</sup> According to Simon, “[t]he murderer, robber, burglar, or addict moving into the neighborhood is no less likely to commit crimes than is the convicted sex offender.”<sup>68</sup> Ultimately,

[a]lthough some sex offenders are at a high risk to re-offend, there is no clear empirical basis for assessing which sex offenders present the most immediate risk for reoffending. Also, there is no evidence that sex offenders are any more mentally disordered than general criminal offenders. The primary pathology attributed to sex offenders, deviant sexual arousal, is beginning to be discredited empirically.<sup>69</sup>

If Simon is correct, the entire foundation of sexual predator laws, based upon the twin notions that sex offenders pose a special danger to the public and suffer from a treatable mental illness, is severely weakened.

### III. THE SUPREME COURT WEIGHS IN – THE RATIONALE OF *HENDRICKS* AND *CRANE*

In the early to mid-1990s, civil commitment laws began to spring up in a number of states, and defendants began to raise new constitutional challenges to these statutes. The Supreme Court had an important say in how these laws were constructed and construed. The Court decided the constitutionality of these measures in *Hendricks*, and then clarified its decision in *Crane*, a second Kansas case that dealt with the actual requirements for committing a sexually violent predator under a civil commitment act.

#### A. *Hendricks and the Constitutionality of Civil Commitment*

The Supreme Court first tackled the issue of the constitutionality of sexual predator laws in 1997 when it took up the case of Leroy Hendricks, a Kansas man who was convicted of taking indecent liberties with two separate thirteen-year-old boys<sup>70</sup> and was sentenced to serve between five and twenty years in prison.<sup>71</sup> The Kansas Legislature had enacted its version of a civil commitment act in 1994 to deal with the special problem of sexually violent

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66. *Id.* at 278.

67. *Id.* at 280.

68. *Id.* Simon believes that this is true because nearly three-quarters of general criminals and sixty percent of rape and sexual assault offenders are on probation or parole and as a group, recommit at a rate of sixty percent. *Id.* Of those on probation, approximately forty percent of violent crime offenders are re-arrested in a three-year period, while only twenty percent of rapists on probation are re-arrested in the same time period. Simon, *supra* note 65, at 280.

69. *Id.* at 284.

70. *Kansas v. Hendricks*, 521 U.S. 346, 351-53 (1997).

71. *In re Hendricks*, 912 P.2d 129, 130 (Kan. 1996).

predators.<sup>72</sup> The Kansas Sexually Violent Predator Act (“KSVPA”) allowed for the civil commitment of a sexually violent predator for the purposes of “long-term control, care and treatment.”<sup>73</sup> The KSVPA defined 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 the predatory acts of sexual violence.<sup>74</sup>

The KSVPA then defined what was meant by a mental abnormality:

[A mental abnormality is a] congenital or acquired condition affecting the emotional or volitional capacity which predisposes the person to commit sexually violent offenses in a degree constituting such person a menace to the health and safety of others.<sup>75</sup>

At his trial, Hendricks was called by the State of Kansas as a witness<sup>76</sup> and admitted that he was unable to control his sexual urges when he became “stressed out.” He also admitted that he was a pedophile who was not cured of his condition, despite his time in jail and his previous stays in mental institutions.<sup>77</sup> A jury found that Hendricks was a sexually violent predator. He was committed by the State to a mental hospital where no treatment program for sexual violent predators was in place at the time of his commitment.<sup>78</sup> The Kansas Supreme Court took up Hendricks’ appeal and in reading the underlying motives of the KSVPA, decided that the Kansas statute violated the substantive due process rights of those ordered committed under the KSVPA.<sup>79</sup>

The Kansas Supreme Court cited a number of reasons for reaching this decision as to the constitutionality of civil commitment acts. In finding a denial of proper due process, the court focused on the failure of the KSVPA to

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72. *Hendricks*, 521 U.S. at 351.

73. KAN. STAT. ANN. § 59-29a01 (Supp. 2002).

74. *Id.* at § 59-29a02(a).

75. *Id.* at § 59-29a02(b).

76. For a discussion of this ability of the state to call a target of a civil commitment proceeding as a witness, see the discussion of evidentiary issues, *infra* Section V.

77. *In re Hendricks*, 912 P.2d 129, 130-31 (Kan. 1996). Evidence was also admitted during the trial to show that Hendricks had a long history of sexual abuse of children apart from the incidents that led to his most recent arrest and confinement, including four cases of molestation and one incident of indecent exposure. *Hendricks*, 521 U.S. at 354.

78. *In re Hendricks*, 912 P.2d at 131. Hendricks was put in the custody of Larned State Hospital at the order of the Secretary of Social and Rehabilitation Services for the state of Kansas. *Id.* While the Secretary’s office had negotiated with two prospective providers for the care and treatment of those committed under the Act, no contract had been reached with either at the time of Hendricks’ commitment. *Id.* Hendricks’ motion to dismiss based on this fact was denied by the trial judge. *Id.* For a discussion of the available treatment options for sexual offenders, see *supra* Section II.

79. *In re Hendricks*, 912 P.2d at 138.

separate those subject to commitment under the KSVPA from other types of criminal offenders. The court was also concerned about the failure of the KSVPA to address issues of treatment, a fact the court relied on in viewing the Act as a veiled attempt to continue incarceration of sexual offenders.<sup>80</sup> In this part of its decision, the court distinguished between mental illness, mental abnormalities, and personality disorders. The KSVPA, according to the Kansas Court, allows for the commitment of the latter, even though the U.S. Supreme Court stated that “to indefinitely confine as dangerous one who has a personality disorder or antisocial personality but is not mentally ill is constitutionally impermissible.”<sup>81</sup> The second conclusion the court reached was based significantly on the legislative history of the KSVPA. The court recognized that “[t]reatment with the goal of reintegrating [sexually violent offenders] into society is incidental” and that “treatment for sexually violent predators is all but nonexistent.”<sup>82</sup> Having found predominate motives besides treatment for the KSVPA, the Kansas Supreme Court reversed the commitment judgment against Hendricks.<sup>83</sup>

In 1996 the United States Supreme Court granted certiorari on the case and handed down its decision in *Hendricks* in June 1997.<sup>84</sup> The majority opinion, written by Justice Clarence Thomas, overturned the decision of the Kansas Supreme Court, and upheld the constitutionality of civil commitment proceedings for sex offenders.<sup>85</sup> In so doing, the majority refused to adopt the “mental illness” standard that the Kansas Court adopted.<sup>86</sup> In addition, the Court dismissed all of Hendricks’ claims that commitment constituted punishment and therefore violated double jeopardy and the ban on ex post facto lawmaking.<sup>87</sup>

Justice Thomas rejected Hendricks’ claims that the KSVPA constituted a criminal proceeding that rendered his confinement a punishment that violated both the double jeopardy and ex post facto lawmaking provisions of the Constitution.<sup>88</sup> In one of the more interesting parts of the decision, Justice Thomas found that the statute was civil on its face and a statute in which the legislature did not seek “to create anything other than a civil commitment

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80. *Id.* at 136.

81. *Id.* at 138 (citing *Foucha v. Louisiana*, 504 U.S. 71, 78 (1992) (allowing the release of a defendant who was found guilty at trial by reason of insanity and who no longer was insane, but who was still considered dangerous because of his anti-social personality)).

82. *Id.* at 136.

83. *Id.* at 138.

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

85. *Id.*

86. *Id.* at 358.

87. *Id.* at 358-63.

88. *Id.* at 360-61.

scheme designed to protect the public from harm.”<sup>89</sup> Justice Thomas reached this decision despite the fact that the Kansas district court found in its examination of the legislative history of the KSVPA, that it was designed to allow the indefinite confinement of those who are dangerous but not mentally ill.<sup>90</sup>

The Court also did not find the KSVPA to be criminal in nature because it did not have the twin goals of criminal law, namely retribution and deterrence.<sup>91</sup> Justice Thomas instead held that the fact that the KSVPA subjected more than those who were convicted of previous offenses to commitment, meant that the KSVPA did “not affix culpability for prior criminal conduct” but rather used such conduct “solely for evidentiary purposes.”<sup>92</sup> The deterrence element was not met because people suffering from a “mental abnormality” are unable to control their behavior and are thus “unlikely to be deterred by the threat of confinement.”<sup>93</sup> Confinement in a mental institution is not considered to be as restrictive as a confinement in prison. Those committed to a mental hospital under a sexually violent predator law do not fall within the definition of those being punished by the State.<sup>94</sup>

The majority opinion also recognized that a “finding of dangerousness, standing alone, is ordinarily not a sufficient ground upon which to justify indefinite involuntary commitment.”<sup>95</sup> This finding had to be coupled with an additional factor, such as mental illness, “limit[ing] involuntary civil commitment to those who suffer from a volitional impairment rendering them dangerous beyond their control.”<sup>96</sup> The additional requirements in the KSVPA are the terms “mental abnormality” and “personality disorder.”<sup>97</sup> Justice Thomas reasoned that both terms allow the statute to meet the requirement that “it narrows the class of persons eligible for confinement to those who are unable to control their dangerousness.”<sup>98</sup> Hendricks then was adequately distinguishable from “other dangerous persons who are perhaps more properly dealt with exclusively through criminal proceedings” and not in the position of having his due process rights violated.<sup>99</sup>

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89. *Hendricks*, 521 U.S. at 361.

90. *In re Hendricks*, 912 P.2d 129, 136 (Kan. 1996). For an examination of the problems and inherent liabilities involved in a determination that these sexually violent predator statutes are actually civil and not criminal proceedings, see *infra* Section V.

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

92. *Id.* at 362.

93. *Id.* at 362-63.

94. *Id.* at 363.

95. *Id.* at 358.

96. *Hendricks*, 521 U.S. at 358.

97. *Id.* at 362.

98. *Id.* at 358.

99. *Id.* at 360.

Justice Thomas also addressed the treatment issue raised by the Kansas Supreme Court. Justice Thomas found that availability of treatment was not a precondition to constitutional civil commitment as a sexually violent predator, but rather that “civil confinement of the dangerously insane” is acceptable even if no form of treatment exists.<sup>100</sup> Justice Thomas disagreed with the Kansas Supreme Court that the focus on punishment renders the KSVPA unconstitutional, finding instead that even if punishment were the overriding purpose of the KSVPA, “this does not rule out the possibility that an ancillary purpose of the Act was to provide treatment, and it does not require [the Court] to conclude that the Act is punitive.”<sup>101</sup> Kansas’ attempt at treatment then, no matter how meager, fits the requirement that confinement must not double as punishment.<sup>102</sup>

Having established the civil nature of the KSVPA, Justice Thomas quickly dismissed any arguments about double jeopardy and *ex post facto* lawmaking. Determining that the statute is a proper civil remedy that is not punishment, the fact that Hendricks was finishing a prison sentence when proceedings against him began did not affect the double jeopardy analysis.<sup>103</sup> Justice Thomas then found the *ex post facto* argument to be “similarly flawed,” as it applies exclusively to criminal statutes and not civil laws.<sup>104</sup> Each of the findings by Justice Thomas was based on his analysis of the punitive and civil nature of the KSVPA, and it was for these conclusions that he was widely criticized.

The first group to challenge Thomas’ majority opinion in *Hendricks* was the dissenters, led by Justice Breyer. Justice Breyer, like Justice Thomas, did not adopt the substantive due process approach taken by the Kansas Supreme Court.<sup>105</sup> Instead, the dissent took issue with the argument that the KSVPA was simply an effort at civil commitment, arguing instead that it was an effort at further punishment of sex offenders like Hendricks.<sup>106</sup> For Breyer, “[c]ertain resemblances between the Act’s ‘civil commitment’ and traditional criminal punishments are obvious.”<sup>107</sup>

The key factor in Breyer’s punitive analysis was the fact that any treatment that may be available is delayed until after the completion of a prior prison sentence.<sup>108</sup> The fact that the Kansas Supreme Court found the purpose of the KSVPA to be mainly punitive, combined with the fact that “[t]he Act explicitly

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100. *Id.* at 366.

101. *Hendricks*, 521 U.S. at 367.

102. *Id.* at 368-69.

103. *Id.* at 369 (citing *Baxstrom v. Herold*, 383 U.S. 107, 111-12 (1966)).

104. *Id.* at 370.

105. *Id.* at 373. (agreeing with the majority’s assessment as to the definition of “mental abnormality”).

106. *Hendricks*, 521 U.S. at 373.

107. *Id.* at 379.

108. *Id.* at 381.

defers diagnosis, evaluation, and commitment proceedings until a few weeks prior to the ‘anticipated release’ of a previously convicted offender from prison,” helped the dissent reach the conclusion that treatment was not a particularly important objective to the Kansas Legislature when it wrote the KSVPA.<sup>109</sup>

The *Hendricks* decision has also been attacked as being an abuse of civil commitment, ignorant of the work that had been done in the field of mental illness, and blatantly unconstitutional. As one scholar noted, “[i]t is bad law, bad social policy, and bad mental health.”<sup>110</sup> In attacking the mental health aspects of the opinion, Michael Perlin also deemed *Hendricks* a “confused and confusing opinion” that helped move sex offenders into the role of “monsters,” which was previously occupied by the mentally ill.<sup>111</sup> Reflecting the historical work of Brakel and Cavanaugh, Perlin described the newest round of sex offender laws as a reaction to the least understood form of criminal behavior and an “ominous[] returning to the days of what many of us had thought was a less enlightened, and thus discarded, past.”<sup>112</sup> Perlin believed that the pressures that helped create the newest batch of sexual predator laws also caused commitment proceedings to become pretextual, with judges and expert witnesses working to ensure the commitment of individuals who they believe need to be institutionalized, regardless of the individual’s actual psychological condition.<sup>113</sup>

Similar criticisms attack *Hendricks* on constitutional terms, disagreeing with Justice Thomas’s decision that the KSVPA did not violate either substantive due process or the double jeopardy clause. Critics postulate different reasons for the Court’s supposed inability to recognize the criminal nature of the Kansas statute and its punitive nature, but agree on the fact that the Court was too quick to dismiss the contention that Kansas had actually created a civil law that was another form of punishment and deterrence.<sup>114</sup> Critics of the decision almost universally have expressed one sentiment—

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109. *Id.* at 385-86.

110. Michael L. Perlin, “*There’s No Success Like Failure/And Failure’s No Success At All*”: *Exposing the Pretextuality of Kansas v. Hendricks*, 92 N.W. U. L. REV. 1247, 1249 (1998).

111. *Id.* at 1248-49.

112. *Id.*

113. *Id.* at 1252, 1258.

114. See, e.g., Andrew D. Campbell, *Kansas v. Hendricks: Absent a Clear Meaning of Punishment, States Are Permitted to Violate Double Jeopardy Clause*, 30 LOY. U. CHI. L.J. 87 (1998) (arguing that the double jeopardy decision is inconsistent with prior decisions on that subject and that the failure of the Court to give a clear meaning to the term punishment significantly decreases Fifth Amendment protections against a police state); Adam D. Hirtz, *Lock’Em Up and Throw Away the Key: Supreme Court Upholds Kansas’ Sexually Violent Predator Act in Kansas v. Hendricks*, 42 ST. LOUIS U. L.J. 545 (1998) (arguing that the Court employed faulty logic in demeaning the act nonpunitive and got caught up in the emotion of the conduct at issue in making its decision).



*Hendricks* is an abuse of governmental powers and an abuse of civil commitment, and the decision's endorsement of civil commitment with little scrutiny of the methodology employed by the state of Kansas poses a significant threat to individual freedom and liberty.<sup>115</sup>

*B. Crane and the Necessary Standard of Lack of Control for Commitment*

Kansas would again be the battleground for the next major case to deal with the issue of civil commitment of sex offenders. The case involved the commitment proceedings of Michael Crane, who pled guilty to one count of sexual battery arising from an incident in which he entered a video store and attempted to force a female employee to perform oral sex upon him.<sup>116</sup> Interestingly, although it implicitly referenced its belief and finding in *In re Hendricks* that the KSVPA was unconstitutional in its focus on punishment rather than treatment,<sup>117</sup> the Kansas Supreme Court worked within the framework laid out by Justice Thomas' majority opinion in *Hendricks* to attack the manner in which the jury was instructed as to Crane's inability to control his own behavior.<sup>118</sup>

The controlling issue in the case, as laid out by the court, was "whether it is constitutionally permissible to commit Crane as a sexual predator absent a

115. One commentator described the problem this way:

The Court's deference on this issue worries many commentators and judges because it may impose no limits on whom a state can civilly commit. For instance . . . a state can [possibly] civilly commit individuals who commit violent crimes and who suffer from antisocial personality disorders. Like the elements of criminal laws, however, the Court has traditionally deferred to state legislators regarding civilly confinable mental illness.

Brian J. Pollock, *Kansas v. Hendricks: A Workable Standard for "Mental Illness" or a Push Down the Slippery Slope Toward State Abuse of Civil Commitment?*, 40 ARIZ. L. REV. 319, 348-49 (1998).

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

117. *See id.* at 287. The Court goes through a detailed analysis of the interactions of the victim and the prosecutor in these cases during its initial laying out of the factual background of the case. The Court first described how the victim was convinced by the prosecutor to go along with Crane's initial guilty plea. The prosecutor stated that obtaining a guilty plea "was the best way to go in order to be able to go down the line" and use the option of the 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." *Id.* (quoting victim's testimony at civil commitment proceeding). The victim then testified at the commitment proceeding that she understood that if the prosecution could get "some kind of conviction," then the KSVPA could be used "later down the road to make sure he stays off the street." *Id.* The prosecutor at the civil commitment case then used this information in his examination of the witness when he asked her the following questions:

So would it be fair to say that for a crime that this Court gave a 35-to-life sentence to Mr. Crane, he only served a little over four years? . . . [a]nd understandably you're very upset about how the system treated you in this case, right?

*Id.* The Court then proceeded to drop this issue completely in its analysis of the case and instead focused solely on the issue of ability to control behavior. *In re Crane*, 7 P.3d at 287.

118. *Id.* at 287-88.

showing that he was unable to control his dangerous behavior.”<sup>119</sup> The Kansas Court answered this question in the negative, agreeing with Crane that the *Hendricks* decision “read a requirement of inability to control behavior into the Act in order to uphold its constitutionality.”<sup>120</sup> The court said this reading of *Hendricks* resulted from “the plain language of the majority opinion,” particularly Justice Thomas’ idea that such a statute must limit involuntary confinement to those whose difficulty in controlling behavior renders them dangerous beyond their own control.<sup>121</sup> It was here that the Kansas Court was to make its finding that would become the epicenter of future analysis of this line of cases. The court decided that, while there was some evidence that Crane had difficulty controlling his behavior, he was diagnosed only with a “personality disorder.”<sup>122</sup> Because the issue of ability to control behavior was a jury issue, and the jury in Crane’s case was not instructed to make a finding regarding Crane’s inability to control his behavior, this failure to so instruct the jury necessitated the reversal and remand of the commitment decision.<sup>123</sup> The argument regarding how to instruct a jury on the ability to control behavior and the necessity of doing so was the major issue in the *Crane* line of cases.

The United States Supreme Court again granted certiorari and addressed the issue of the constitutional requirements necessary for the KSVPA. The Court vacated the decision of the Kansas Supreme Court, but did so while generally agreeing with that Court’s assessment of the *Hendricks* decision. This decision acts as a fine bit of irony because it was written by Justice Breyer, a dissenter in *Hendricks*. Two justices, Scalia and Thomas, dissented in *Crane*, and Thomas was the justice who wrote the majority opinion in *Hendricks*.<sup>124</sup>

The reason that the Court in *Crane* vacated and remanded the decision of the Kansas Supreme Court was that it read the Kansas decision to require a showing of complete lack of control. As the Court frequently noted, the reference in *Hendricks* to difficulty in maintaining control of behavior is not an absolute requirement.<sup>125</sup> The majority was quick to make clear that the decision to vacate did not indicate agreement with the State of Kansas’ position that the Constitution and *Hendricks* allow commitment of a dangerous

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119. *Id.* at 287.

120. *Id.* at 290.

121. *Id.* at 290.

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

123. *Id.*

124. For these reasons, *Crane* serves as an excellent example of Justices “switching sides” in order to moderate an opinion or to mitigate the effects of a previous opinion. For a broader discussion of this idea, see Evan H. Caminker, *Sincere and Strategic Voting Norms on Multimember Courts*, 97 MICH. L. REV. 2297 (1999); Bernard Schwartz & James A. Thompson, *Inside the Supreme Court: A Sanctum Sanctorum?* 66 MISS. L.J. 177 (1996).

125. *Kansas v. Crane*, 534 U.S. 407, 411-12 (2002).

sexual offender “without *any* lack-of-control determination.”<sup>126</sup> Rather, the *Hendricks* decision underscored the importance of making distinctions between sexual offenders subject to commitment and those more appropriately dealt with through the criminal justice system.<sup>127</sup> As the Court noted, “[t]hat distinction is necessary lest ‘civil commitment’ become a ‘mechanism for retribution or general deterrence’ – functions properly those of criminal law, not civil commitment.”<sup>128</sup> Having clearly established the need for the state to demonstrate the respondent’s difficulty in controlling behavior, the majority in *Crane* proceeded to muddy the waters, creating confusion among state courts on the issue of lack of control.

Justice Breyer, in discussing lack of control, said that this concept cannot be defined with “mathematical precision,” but rather proof of serious difficulty in controlling behavior is enough to meet this new requirement that the Court had laid out in interpreting *Hendricks*.<sup>129</sup> In a bit of circular logic, Breyer then defined the concept of difficulty in controlling behavior, which he earlier identified as the distinguishing characteristic between those subject to civil commitment and those appropriately handled in the criminal justice system, in the following passage:

And [the serious difficulty in controlling behavior], 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.<sup>130</sup>

As the majority opinion recognized, “*Hendricks* as so read provides a less precise constitutional standard.”<sup>131</sup> Believing that a bright-line rule was inappropriate in this situation, the Court instead left states with the assurance that “our cases suggest that civil commitment of dangerous sexual offenders will normally involve individuals who find it particularly difficult to control their behavior.”<sup>132</sup> This assessment may fall in line with the average jury’s view of someone subject to commitment, but it does not reflect the current struggle amongst the various states that have taken up the issue over what this new requirement necessitates.

As mentioned previously, Justices Scalia and Thomas dissented in *Crane*. The dissent focused on the necessity that courts enforce an additional

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126. *Id.* at 412.

127. *Id.* See *supra* text accompanying note 114.

128. *Crane*, 534 U.S. at 412 (citing *Kansas v. Hendricks*, 521 U.S. 346, 372-73 (1996) (Kennedy, J. concurring)).

129. *Id.* at 413.

130. *Id.*

131. *Id.*

132. *Id.* at 414.

requirement of serious difficulty in controlling behavior. Justice Scalia insisted that the *Hendricks* opinion required that the “finding of a *causal connection* between the likelihood of repeat acts of sexual violence and the existence of a ‘mental abnormality’ or ‘personality disorder’ *necessarily* establishes ‘difficulty if not impossibility’ in controlling behavior.”<sup>133</sup> For Scalia then, the existence of the mental or personality disorder that results in the likelihood of recidivism established the difficulty of controlling behavior by itself.<sup>134</sup>

Justice Scalia did recognize that the variable degree of difficulty finding required by the majority would leave trial courts without a clue as to how to instruct the jury under these new standards.<sup>135</sup> Justice Scalia believed this failure of the majority to define the new standard for adequate jury instructions resulted from the Court’s inability to articulate a plausible standard.<sup>136</sup> He went so far as to criticize the majority as “irresponsible” for leaving the law “in such a state of utter indeterminacy.”<sup>137</sup> While one can argue the validity of both viewpoints on the question of the defendant’s difficulty in controlling behavior as outlined in *Crane*, the resulting split among state courts on the issue of jury instructions regarding the difficulty in controlling behavior requirement lends significant credence to Scalia’s position on this issue.

#### IV. DEFINING THE “LESS PRECISE CONSTITUTIONAL STANDARD”: THOMAS AND ALTERNATIVE APPROACHES TO THE *CRANE* DECISION

The majority and the dissent in *Crane* acknowledged that the lack of control standard as laid out in that case was either deliberately imprecise or irresponsibly indeterminate.<sup>138</sup> A major split has arisen since the *Crane*

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

134. *Id.* at 419-20.

135. *Id.* at 423.

136. *Id.* at 423-24.

137. *Id.* at 424 (Scalia, J., dissenting). Scalia goes on to criticize the majority’s opinion in even harsher terms:

Today’s holding would make bad law in any circumstances . . . it both distorts our law and degrades our authority. The State of Kansas, unable to apply its legislature’s sexual predator legislation as written because of the Kansas Supreme Court’s erroneous view of the Federal Constitution, sought and received certiorari in *Hendricks*, and achieved a reversal, in an opinion holding that “the Kansas Sexually Violent Predator Act comports with substantive due process requirements,” [citation omitted]. The Kansas Supreme Court still did not like the law and prevented its operation . . . once again. The State of Kansas again sought certiorari, asking nothing more than reaffirmation of our 5-year-old opinion—only to be told that what we said then we now unsay. There is an obvious lesson here for state supreme courts that do not agree with our jurisprudence: ignoring it is worth a try.

*Crane*, 534 U.S. at 424.

138. See *supra* text accompanying notes 124-37, 129-31.

decision regarding what the new standard means, and more precisely, what this decision requires of trial courts. The particular problem is what instructions on lack of control the trial judge must give to the jury. This section will examine Missouri's approach to the problem, how other states have dealt with the issue in comparison, and which of the alternatives suggested by these various state courts meets the requisite intent and standard laid out by *Crane* and so vehemently opposed by the dissent in that case.

A. *Thomas and the Need for a Lack of Control Instruction*

Eddie Thomas was convicted in 1982 of multiple counts of forcible rape and forcible sodomy. All of his victims were minors.<sup>139</sup> After serving seventeen years of a twenty-three year sentence, Thomas was scheduled to be released in the summer of 1999.<sup>140</sup> Before his release date, the State of Missouri petitioned to have him committed by the Missouri Department of Mental Health in accordance with Missouri's sexual predator law.<sup>141</sup> As the *Thomas* court recognized, the Kansas and Missouri sexual predator acts are virtually the same in all aspects relevant to this case.<sup>142</sup> Missouri's definition of a sexually violent predator subject to civil commitment, below, is substantially the same as the Kansas statute:

[A]ny person who suffers from a mental abnormality which makes the person more likely than not to engage in predatory acts of sexual violence if not confined in a secure facility and who . . . [h]as pled guilty or been found guilty . . . of a sexually violent offense.<sup>143</sup>

Likewise, Missouri treats the issue of a mental abnormality that qualifies a sexual predator for commitment in similar terms to Kansas:

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139. *Thomas v. State*, 74 S.W.3d 789, 790 (Mo. 2002). Thomas's case was considered in conjunction with that of Desi Edwards. Edwards was convicted of raping a child in 1989 and served eight years of a ten year sentence. *Id.* Edwards was released on parole in 1997, but was returned to prison after he violated his parole by using alcohol and failing to pay required fees. *Id.* During this second incarceration, the State of Missouri moved to have Edwards committed under the state's sexual predator law. *Id.*

140. *Id.*

141. *Thomas*, 74 S.W.3d at 790. Missouri's Sexual Predator Statute can be found at MO. REV. STAT. § 632.480 (West 2000 & Supp. 2003).

142. *Thomas*, 74 S.W.3d at 790.

143. MO. REV. STAT. § 632.480(5). Kansas's statute reads as follows: "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(a) (West 1994 & Supp. 2002).

[A] congenital or acquired condition affecting the emotional or volitional capacity which predisposes the person to commit sexually violent offenses in a degree constituting such person a menace to the health and safety of others.<sup>144</sup>

The similarity between these two statutes allowed the *Thomas* court to conduct the analysis of the case under the direct precedent of *Crane*, and allowed the justices to address challenges both to the constitutionality of the Missouri statute and the validity of the jury instructions given at their commitment proceedings at the same time.<sup>145</sup>

The *Thomas* court easily dismissed the first question because both *Hendricks* and *Crane* directly upheld the validity of a nearly identical sex offender commitment act in light of concerns about substantive due process, double jeopardy, and *ex post facto* law making.<sup>146</sup> How these decisions, and in particular the *Crane* decision, affected the jury instruction issue became the focus of *Thomas*. To best understand the *Thomas* decision, it is necessary to look at how the juries in the cases at issue were instructed.

In the original trials for both Thomas and Edwards, the trial judges gave the juries the following instructions:

If you find from the evidence beyond a reasonable doubt . . . that the respondent suffers from a mental abnormality, and . . . that as a result of this abnormality the respondent is more likely than not to engage in predatory acts of sexual violence if he is not confined in a secure facility, then you will find respondent is a sexually violent predator.<sup>147</sup>

The instructions then went on to define mental abnormality exactly as the statute does,<sup>148</sup> and to define “predatory” as “acts directed towards strangers or individuals with whom relationships have been established or promoted for the primary purpose of victimization.”<sup>149</sup> The Missouri Supreme Court found these instructions to be deficient under the *Crane* standard.<sup>150</sup>

After summarizing some of the relevant portions of the *Crane* and *Hendricks* decisions, the *Thomas* court made it clear that it believed these decisions uphold the constitutionality of sexual predator commitment laws so long as there is evidence to establish that the “mental abnormality” or “personality disorder” of the respondent causes serious difficulty in controlling their behavior and that *the jury must also be instructed* that the degree to which the person cannot control his or her behavior reaches the level of “serious

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144. MO. REV. STAT. § 632.480(2) (2000). The Kansas statute reads exactly the same as the Missouri statute. KAN. STAT. ANN. § 59-29a02(b) (1994).

145. *Thomas*, 74 S.W.3d at 790.

146. *Id.* at 791.

147. *Id.* at 790.

148. *See supra* note 144.

149. *Thomas*, 74 S.W.3d at 790.

150. *Id.*

difficulty.”<sup>151</sup> *Thomas* further concluded that the “serious difficulty” requirement found by the Supreme Court in *Crane* is simply a refinement of the term “mental abnormality,” not an addition of a newly created constitutional element to the validity of sex offender commitment laws.<sup>152</sup> The clarification of “mental abnormality” by *Crane* and *Thomas* requires a specific type of jury instruction that was not given in either of the Missouri cases at issue. A proper jury instruction must inform the jury of the “serious difficulty” in controlling behavior requirement in order to comply with *Crane*.<sup>153</sup>

Chief Justice Limbaugh of the Missouri Supreme Court took issue with these findings of the *Thomas* majority in his dissent.<sup>154</sup> Limbaugh’s basic contention was that “the Supreme Court made no mention whatsoever of the need for a new instruction” in *Crane*.<sup>155</sup> He instead insisted in his dissent that the instruction given to the juries, “though couched in different language,” required the jury to reach the same conclusions regarding serious difficulty in controlling behavior as required in *Crane*.<sup>156</sup> Limbaugh reached this decision through his argument that *Crane* was simply a clarification of “the constitutional threshold on which the Kansas statute had already been upheld.”<sup>157</sup> Limbaugh believed that proving the existence of a “mental abnormality” that makes the individual more likely to commit future acts of sexual violence is a permissible way for the jury to find “serious difficulty in controlling behavior.”<sup>158</sup>

Chief Justice Limbaugh went on to argue that the Supreme Court’s reaffirmation of the main holdings of *Hendricks* in *Crane* precludes the conclusion that a new instruction must be given because of its failure to distinguish between sex offenders who are simple recidivists and those whose mental condition make them subject to civil commitment.<sup>159</sup> If the majority’s opinion were true, according to Limbaugh, *Crane* would then be requiring a new constitutional element within sexual predator statutes.<sup>160</sup> The proper recourse for such a finding would be to strike down the statute as

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151. *Id.* at 791.

152. *Id.* at 792 n. 1.

153. *Id.* at 792. The entire instruction laid out by the Court read as follows:

As used in this instruction, “mental abnormality” means a congenital or acquired condition affecting the emotional or volitional capacity that predisposes the person to commit sexually violent offenses in a degree that causes the individual serious difficulty in controlling his behavior.

*Thomas*, 74 S.W.3d at 792.

154. *Id.* (Limbaugh, J., dissenting).

155. *Id.*

156. *Id.*

157. *Id.*

158. *Thomas*, 74 S.W.3d at 792-93.

159. *Id.* at 793.

160. *Id.*

unconstitutional, rather than rewriting the instruction, which effectively means rewriting the statute itself.<sup>161</sup> Limbaugh believed this is what the majority had done, and he dismissed their argument that the new instruction is simply a “refinement” of existing language in the statute.<sup>162</sup> As he argued in summary, if the old instruction was not constitutionally valid, the new instruction with different language “must mean something different than that used in the instruction that was given.”<sup>163</sup> Such an interpretation should have required the court to decide that the instruction given was sufficient under *Crane*.<sup>164</sup>

### B. Other State Approaches to a Lack of Control Instruction

A number of states, which have handled this issue since *Crane* was handed down, have reached different conclusions than that of the Missouri Supreme Court. At least five other states have taken a different approach to the connection of dangerousness and mental abnormality that *Thomas* embraced.<sup>165</sup> To illustrate these differences, this portion of the Note will examine other states that have handed down similar decisions disagreeing with the *Thomas* approach to the dangerousness requirement and the need for jury instructions on that matter.

Florida’s Civil Commitment of Sexually Violent Predators Act (the “Ryce Act”) allows for the commitment of “sexually violent predators”<sup>166</sup> who suffer from a “mental abnormality.”<sup>167</sup> In 1999, a jury found Mitchell Westerheide, who had been convicted for lewd and lascivious assault on a child and sexual performance on a child, to be a sexually violent predator subject to commitment under the Ryce Act.<sup>168</sup> After dismissing Westerheide’s claims of double jeopardy and other constitutional challenges to the statute based on both

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161. *Id.*

162. *Id.*

163. *Thomas*, 74 S.W.3d at 793.

164. *Id.*

165. In addition to the states discussed in this Note, other states with sexual predator laws have also taken up this issue. *See, e.g.*, *People v. Ghilotti*, 44 P.3d 949 (Cal. 2002) (rejecting the necessity of an explicit jury instruction on difficulty in controlling behavior and interpreting the link between mental disorder and dangerousness as satisfying *Crane* because the particular form of dangerousness, a mental disorder, not the particular degree of dangerousness, distinguishes individuals subject to commitment from the typical recidivist).

166. Defined as anyone who “[h]as been convicted of a sexually violent offense; and . . . [s]uffers from a mental abnormality or personality disorder that makes the person likely to engage in acts of sexual violence if not confined in a secure facility for long-term control, care, and treatment.” FLA. STAT. ANN. § 394.912(10)(a), (b) (2002).

167. Defined as “a mental condition affecting a person’s emotional or volitional capacity which predisposes the person to commit sexually violent offenses.” FLA. STAT. ANN. § 394.912(5) (2002).

168. *Westerheide v. Florida*, 831 So.2d 93, 97 (Fla. 2002).



*Hendricks* and *Crane*, the Florida Court turned to the issue of dangerousness and jury instructions.

Much like Chief Justice Limbaugh's arguments in *Thomas*, the Florida Supreme Court decided that *Crane* did not require a specific jury instruction, but rather only that there be proof of "serious difficulty in controlling behavior."<sup>169</sup> The majority found the instruction given in this case meant the jury had to conclude that Westerheide's ability to control his dangerous behavior was impaired to the point that he posed a threat to others. The court concluded this despite the fact that the words "serious difficulty" were not used, but simply that their meaning was conveyed to the jury.<sup>170</sup> To further justify this conclusion, the court looked to the lack of a "bright-line rule" in *Crane* regarding the lack of control determination, and, as others before, pointed to Justice Breyer's allusion to the lack of "mathematical precision" regarding the level of dangerousness necessary for a statute to remain constitutionally firm.<sup>171</sup>

Wisconsin's Supreme Court reached a similar decision in the case of John Lee Laxton.<sup>172</sup> Laxton had been convicted on five different counts of sexual assault and child abduction and was paroled in 1994.<sup>173</sup> His parole was revoked shortly thereafter when he was caught window peeping on two young female children. Before his second scheduled release, the state of Wisconsin moved to have him committed under the state's sexually violent person act.<sup>174</sup> This statute defined the key terms for commitment in substantially the same way as those previously discussed.<sup>175</sup>

169. *Id.* at 107.

170. *Id.* at 108. The jury instructions read as follows:

[M]ental condition affecting a person's emotional or volitional capacity which predisposes the person to commit sexually violent offenses. The term volitional means the act of will or choosing or the act of deciding or the exercise of will . . . [L]ikely to engage in acts of sexual violence means a person's propensity to commit acts of sexual violence is of such a degree as to pose a menace to the health and safety of others.

*Id.*

171. *Id.* at 109.

172. *In re Laxton*, 647 N.W.2d 784 (Wis. 2002).

173. *Id.* at 787.

174. *Id.*

175. The statute defines "sexually violent person" as:

[A] person who has been convicted of a sexually violent offense, has been adjudicated delinquent for a sexually violent offense, or has been found not guilty of or not responsible for a sexually violent offense by reason of insanity or mental disease, defect or illness, and who is dangerous because he or she suffers from mental disorder that makes it substantially probable that the person will engage in acts of sexual violence.

WIS. STAT. ANN. § 980.01(7) (1998).

"Mental disorder" is defined as "a congenital or acquired condition affecting the emotional or volitional capacity that predisposes a person to engage in acts of sexual violence." WIS. STAT. ANN. § 980.01(2) (1998).

The jury in *Laxton* was instructed that the State must prove three elements beyond a reasonable doubt before they could order Laxton committed. They were that he “[h]as been convicted of a sexually violent offense . . . has a mental disorder . . . [and] is dangerous to others because he has a mental disorder which creates a substantial probability that he will engage in acts of sexual violence.”<sup>176</sup>

The majority in *Laxton* upheld this instruction, finding as *Westerheide* did, that neither a separate factual finding nor a separate jury instruction was necessary on the issue of the sex offender’s level of difficulty in controlling behavior.<sup>177</sup> Instead, evidence of a lack of control requirement identified in *Crane* could be established “by evidence of the individual’s mental disorder and requisite level of dangerousness,” which would distinguish the sex offender who has serious difficulty controlling behavior from the “dangerous but typical recidivist.”<sup>178</sup>

The *Laxton* court justified this conclusion by saying that the due process requirement identified in *Crane* is satisfied by the Wisconsin’s statute’s “nexus” between an individual’s dangerousness and that person’s mental disorder.<sup>179</sup> In order to commit a person under the statute, it must be established that a person is sexually violent, and this necessarily requires proof “that the person’s mental disorder includes serious difficulty in controlling *his or her* behavior.”<sup>180</sup> The court believed that the *Laxton* jury, in finding it substantially probable that Laxton would engage in future acts of sexual violence, must have concluded that his mental abnormality created for him a serious difficulty in controlling his behavior.<sup>181</sup>

Mirroring the dynamics of *Thomas*, the Chief Justice of the Wisconsin Supreme Court dissented from the majority opinion in *Laxton*. As opposed to the majority’s detailed discussion of other issues, Chief Justice Abrahamson

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176. *Laxton*, 647 N.W.2d at 787.

177. *Id.* at 793.

178. *Id.*

179. *Id.*

180. *Id.* at 794 (emphasis added). Wisconsin’s Supreme Court is one of the few courts that has tackled this issue that has not assumed that those targeted for commitment will be males. Missouri’s Court of Appeals for the Eastern District dealt with the commitment case of a female sex offender shortly before the publication of this Note. In that decision, the court ordered the release of the woman on the basis that the State’s evidence was insufficient to support a finding that a female defendant was more likely than not to reoffend. *In re Coffel*, 2003 WL 716682, No. ED 79989 (Mo. Ct. App. Mar. 4, 2003). The Missouri Court of Appeals rendered its decision shortly before publication of this Note. See *In re Coffel*, 2003 WL716682, No. ED79989 (Mo. Ct. App. Mar. 4, 2003). For a study of female sexual offenders, see Catherine A. Lewis and Charlotte R. Stanley, *Women Accused of Sexual Offenses*, 18 BEHAV. SCI. & LAW 73 (2000) (finding that women accused of sexual offenses have a high likelihood of past or ongoing sexual and physical victimization).

181. *Laxton*, 647 N.W.2d at 795.

focused her entire dissent on the issue she believed to be the only important one of the case: “whether the jury instructions in the present case correctly advised the jury that it must be persuaded . . . that Laxton had serious difficulty in controlling his behavior.”<sup>182</sup> She concluded that the jury instructions did not reach this standard and that, as a result, the validity of the jury determination must be called into question and vacated.<sup>183</sup>

Chief Justice Abrahamson reached this conclusion because she believed the instructions could not have informed a reasonable jury that it needed to find that Laxton had serious difficulty in controlling his behavior in order to issue a commitment order.<sup>184</sup> Justice Abrahamson accused the majority of reading “a constitutional gloss” into the sexual predator statute that would require a jury to act in a similar manner in order to correctly reach a proper decision on the issue of reasonableness.<sup>185</sup> However, Justice Abrahamson believed this to be impossible because the serious difficulty in controlling behavior requirement of *Crane* does not equate with the Wisconsin instruction mandating a jury to find a mental disorder that affects “an individual’s emotional or volitional capacity.”<sup>186</sup> Such an instruction as the one given did not require the jury to distinguish between sex offenders rendered dangerous because of their mental condition and ordinary recidivists, which was the overriding concern of *Crane*.<sup>187</sup>

The Illinois Supreme Court also decided that no specific instruction was required in *People v. Hancock*.<sup>188</sup> Two court-appointed psychologists diagnosed Hancock as a pedophile and voyeur with a history of exhibitionism, but disagreed over whether a pedophile was automatically sexually dangerous.<sup>189</sup> While the trial court instructed the jury that it could consider Hancock’s prior sexual history in making its determination, it did not require a specific determination of lack of volitional control.<sup>190</sup> Hancock appealed his conviction, but the Illinois Supreme Court decided that because the nature and severity of the mental disorder in sex predator cases distinguish individuals subject to commitment from the typical recidivist, the instructions given at the

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182. *Id.* at 797 (Abrahamson, J., dissenting).

183. *Id.* at 798. Justice Abrahamson wrote that “[a] jury instruction must fully and fairly inform the jury of the principles of law it should apply” in order to be upheld on appeal. *Id.*

184. *Id.*

185. *Laxton*, 647 N.W.2d at 798.

186. *Id.*

187. *Id.*

188. 771 N.E.2d 459 (Ill. App. 3d 2002). Interestingly, unlike in other cases which have been discussed, Hancock had not been convicted of a prior sexual offense. *Id.* at 461-62. Instead, he was charged with sexual assault and sexual abuse, and the state of Illinois decided to pursue civil commitment rather than criminal charges in the matter. *Id.*

189. *Id.* at 462.

190. *Id.* at 462-63.

trial level were constitutionally firm.<sup>191</sup> In reaching this decision, the Illinois Supreme Court decided the focus of *Crane* should be on its reaffirmation of the *Hendricks* concern with distinguishing criminal and civil proceedings, rather than on the ability of the respondent to control his sexual behavior.<sup>192</sup>

Massachusetts is another state that has rejected the need for a specific jury instruction on the level of difficulty in controlling behavior in a case from May 2002, *In re Dutil*.<sup>193</sup> Dutil was originally charged and sentenced to probation for indecent assault and battery on a minor. He later violated his parole and subsequently pled guilty to similar charges stemming from a separate incident.<sup>194</sup> Much like the *Hancock* court, the Massachusetts Supreme Court focused on the *Crane* reaffirmation of the distinction between civil commitment and criminal punishment as originally outlined in *Hendricks*.<sup>195</sup> This focus allowed the court to interpret the sexually violent person commitment law as implicitly requiring a mental condition, even if specific terms are not used, and to interpret the instruction given as to the “general lack of power to control” as consistent with *Crane*.<sup>196</sup> This interpretation brings Massachusetts in line with the other states that have rejected the specificity required for jury instructions on lack of control, as pronounced in *Thomas*.

C. *Missouri Got It Right – A Lack of Control Instruction is Necessary Under Crane*

Two very different views of the *Crane* decision have been laid out in these state cases on the issues of lack of control and dangerousness. These differences of opinion over *Crane*'s view of the issue ultimately boil down to the necessity of a jury instruction. In terms of the states that have addressed this issue, *Thomas*' requirement of a specific instruction on lack of control is in the minority.<sup>197</sup> Three different factors lead to the conclusion that the *Thomas* court reached the correct decision: a small piece of the Kansas Supreme Court's decision in *In re Crane* and the Supreme Court's approach to that case;

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191. *Hancock*, 771 N.E.2d at 466.

192. *Id.*

193. 768 N.E.2d 1055 (Mass. 2002). Dutil was convicted as a sexually dangerous person and confined to a treatment center in 1988. *Id.* He appealed his commitment order on the basis of the new constitutional standards he perceived *Crane* to have laid out. *Id.* at 1058-59.

194. *Id.* at 1060.

195. *Id.* at 1061.

196. *Dutil*, 768 N.E.2d at 1063-64.

197. The Iowa Supreme Court recently agreed with the Missouri Supreme Court's decision in *Thomas*, becoming the first to join Missouri in this minority. See *In re Detention of Barnes*, 658 N.W.2d 98, 101 (Iowa 2003) (finding that the jury instruction on the term “mental abnormality” was inadequate because it did not require a showing of serious difficulty in controlling behavior and adopting the instruction laid out by the Missouri Supreme Court in *Thomas*).

the logic behind the Court's majority opinion in *Crane*; and finally, the dismay over the new standard set forth by the majority in Justice Scalia's dissent.

The Kansas Supreme Court in *In re Crane* held that "the Act cannot be applied to [Crane] in the absence of a finding that he was unable to control his behavior."<sup>198</sup> Indeed, the Kansas court's decision was replete with references to the necessity of certain findings and instructions. The court then connected the issues of finding and instructions in its summary of *Hendricks* when it wrote that a constitutionally sufficient finding "is a question for the jury, which was not instructed to make a finding as to Crane's inability to control his behavior."<sup>199</sup> The failure to make such an instruction on lack of control was the reason the court reversed the commitment order of Crane, saying that "the failure to so instruct the jury was error and requires that we reverse and remand for a new trial."<sup>200</sup> In *Crane*, the United States Supreme Court said this decision was "an overly restrictive" interpretation of *Hendricks*.<sup>201</sup> The Court in *Crane* did not take issue with the idea that some finding of dangerousness is necessary for a proper commitment order and that an instruction on the point is essential. Instead, the Court only challenged the Kansas Court's determination as to the degree of lack of control that must be established by the state in these proceedings.

The strongest argument in support of the *Thomas* position on a jury instruction is the majority opinion in *Crane*. The groundwork for Justice Breyer's opinion was the idea, reestablished by *Hendricks*, that a statute that did not distinguish between ordinary recidivists and those sex offenders who could not control their behavior because of a mental condition, would be unconstitutional. While *Crane* vacated the opinion of the Kansas Supreme Court, it did not decry the logic and reasoning of that court in finding it necessary that an inability to control behavior be established for commitment to be ordered. Instead, *Crane* took issue with the degree of lack of control necessary before that threshold is reached. *Crane* does not support the inference from the original trial court's decision that the jury instructions, which did not include lack of control, were constitutional. The majority opinion made no such mention of the validity of the trial court's instructions. Ultimately, the very existence of the *Crane* decision mandates the conclusion that the Court was requiring the establishment of at least, as the *Thomas* court said, a "clarification" of the findings of mental abnormality. If lack of control, as discussed in *Crane*, could simply be read into the current instructions of sexual predator laws, as states such as Wisconsin and Florida have argued,

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198. *In re Crane*, 7 P.3d 285, 290 (Kan. 2000).

199. *Id.*

200. *Id.*

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

then the Supreme Court would have restored the verdict of the original trial jury as opposed to simply vacating the decision of the Kansas Supreme Court.

Chief Justice Abrahamson made a very important point along this line in her dissent in *Laxton*: “The majority opinion’s linkage or nexus analysis of the jury instructions adopts Justice Scalia’s dissenting view in *Crane*.”<sup>202</sup> Indeed, the dissent by Scalia supports the conclusion that *Crane* established a new requirement for sex offender commitment proceedings in order to maintain constitutionality, as previously argued. Scalia’s entire argument was targeted at the lack of necessity in the majority opinion because it should be permissible for the current instructions to require a jury to make the lack of control finding argued for by the majority.<sup>203</sup> Scalia also said in his dissent that the majority was “establishing the requirement of a separate *finding* of inability to control behavior” in its decision.<sup>204</sup> Furthermore, he thought this distinction and clarification was unnecessary, which was the basis of his reasoning.

Scalia’s language in arguing against the majority’s “less precise constitutional standard” also gives away the fact that he believed the *Crane* decision was creating a jury instruction requirement. Much of his attack on the potential problems that could be created by the majority decision stem from his belief that it necessitated both the need for a finding and an instruction on lack of control.<sup>205</sup> As Scalia said, the majority decision is fundamentally flawed because “it gives trial courts, in future cases under the many commitment statutes similar to Kansas’s SVPA, *not a clue* as to how they are supposed to charge the jury!”<sup>206</sup> The fact that Scalia went into some depth in exploring what necessary instructions should be given to juries in such cases,<sup>207</sup> and that he admonished the majority for its “irresponsibility” in failing to give the trial

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202. *In re Laxton*, 647 N.W.2d 784, 797 (Wis. 2002).

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

204. *Id.* at 419.

205. *Id.* at 420.

206. *Id.* at 423.

207. Scalia’s discussion of this issue is emphasized by his listing of potential jury charges: How *is* one to frame for a jury the degree of “inability to control” which, in the particular case, “the nature of the psychiatric diagnosis, and the severity of the mental abnormality” require? Will it be a percentage (“Ladies and gentlemen of the jury, you may commit Mr. Crane under the SVPA only if you find, beyond a reasonable doubt, that he is 42% unable to control his penchant for sexual violence”)? Or a frequency ratio (“Ladies and gentlemen of the jury, you may commit Mr. Crane under the SVPA only if you find, beyond a reasonable doubt, that he is unable to control his penchant for sexual violence 3 times out of 10”)? Or merely an adverb (“Ladies and gentlemen of the jury, you may commit Mr. Crane under the SVPA only if you find, beyond a reasonable doubt, that he is appreciably—or moderately, or substantially, or almost totally—unable to control his penchant for sexual violence”)? None of these seems to me satisfactory.

*Id.* at 423-24.

court specific instructions<sup>208</sup> in this case, further substantiates the conclusion that instructions themselves are what *Crane* requires.

All three important parts of the *Crane* decision on the state and federal level point to the conclusion of the Missouri Supreme Court in *Thomas* that a specific instruction is necessary on the issue of lack of control to ensure that the due process protections of *Crane* are met. Chief Justice Abrahamson articulated it best in her dissent in *Laxton* when she stated the following to both the majority in *Laxton* and other state courts that have chosen to adopt the position of Justice Scalia in *Crane*: “The court is obliged to follow the majority opinion in *Crane*, not the dissent.”<sup>209</sup> A more succinct summary of the inadequacy of the state decisions in opposition to *Thomas* is not likely to be formulated in other terms.

#### V. THE DANGER NEXT DOOR: WHY JURY INSTRUCTIONS DO NOT OFFER ADEQUATE CONSTITUTIONAL PROTECTIONS IN COMMITMENT PROCEEDINGS

Assuming that a lack of control is required, as this Note argues, what difference will this make in actual commitment proceedings? The answer to this question is that an instruction will make little to no difference in the likelihood of a jury ordering commitment of a convicted sex offender. An excerpt from *Crane* illustrates this problem:

Ordinary recidivists *choose* to reoffend and are therefore amenable to deterrence through the criminal law; those subject to civil commitment under the SVPA, because their mental illness is an affliction and not a choice, are unlikely to be deterred.<sup>210</sup>

In light of this distinction between those subject to commitment and those who are not, along with the fact that nearly all those subject to commitment proceedings are convicted sex offenders, the one avenue left open for a defendant to avoid commitment in these proceedings is to argue that the individual does not have a problem controlling behavior—rather, the individual’s acts of sexual misconduct are willful and intentional! It seems highly illogical to believe that a jury is going to release such a person into society regardless of constitutional mandates or the manner in which it is instructed.

The history of sexual predator laws also lends credence to the idea that modern proceedings nearly guarantee an extended form of punishment for any sex offender who is put before a jury. As Brakel and Cavanaugh noted in their description of mid-twentieth century commitment laws, “[t]he procedural shortcuts permitted by most statutes could be winked at, given the benign

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208. *Crane*, 534 U.S. at 423-24.

209. *In re Laxton*, 647 N.W.2d 784, 798 (Wis. 2002).

210. *Crane*, 534 U.S. at 420.

intentions and predicted good outcomes” of these laws.<sup>211</sup> Indeed, the entire history behind the modern development of registration, community notification and commitment laws speaks to the fact that such measures are designed to alleviate public fears and protect them from these “monsters” who otherwise would be living amidst the general public without the community’s knowledge.

It is also important to mention some of the other evidentiary rules that govern these proceedings and how, in combination with known public fears of sex offenders, they almost guarantee commitment of those targeted by the State. Many states have rules that allow for the unsupervised examination of offenders by state experts, the deposing of offenders, and the testimony of victims at trial.<sup>212</sup> Only in Wisconsin do proceedings guarantee the sex offender the same rights as in a criminal trial, including Fifth Amendment rights against self-incrimination and the ability to decide whether or not a jury trial is conducted. Such a system of proceeding raises serious concerns about the legitimacy and integrity of the system, while also raising a number of collateral situations that present potential problems.<sup>213</sup>

An examination of the Missouri sexual predator statutes and a recent case on the ability to appeal a commitment order under the act lend insight into this problem. While a “detained person” subject to possible commitment under the law has a right to counsel, present evidence, and to cross-examine witnesses, Missouri law mandates that such an individual be examined by a state psychologist for assessment, and that psychologist may also interview family members and friends of the sex offender and the past victims of the sex offender.<sup>214</sup> In addition, at the trial itself, the state or the judge can decide to have a jury trial regardless of the sex offender’s preference, although a jury trial does require a unanimous decision on commitment to be effective.<sup>215</sup>

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211. Brakel & Cavanaugh, *supra* note 33, at 72.

212. See generally Richard L. Polin, *Sexually Violent Predator Commitment Proceedings: A Proposal for Rules of Procedure*, 75 FLA. BAR J. 51 (2001); Joelle Anne Moreno, *Whoever Fights Monsters Should See to it That in the Process [sic] She Does not Become a Monster: Hunting the Sexual Predator with Silver Bullets – Federal Rules of Evidence 413-415 — and a Stake Through the Heart – Kansas v. Hendricks*, 49 FLA. L. REV. 505 (1997).

213. A small point in *In re Crane* case illustrates one of these issues. At trial, Crane attempted to stipulate to his past sexual behaviors and convictions, but the trial court held that under the open door policy of the proceedings the State was allowed to illustrate his past history in whatever manner it desired. *In re Crane*, 7 P.3d 285, 293 (Kan. 2000). See also Bradford v. Mo. Dept. of Corrections, 46 Fed. Appx. 857 (8th Cir. 2002) (raising concerns over sex offenders’ fifth amendment right not to incriminate himself or herself); Michael Booth, *Court Bars Civil-Commitment Waiver as Lure For Sex Offender’s Guilty Plea*, 168 N.J. L.J. 171 (2002) (reporting on a New Jersey court’s decision to disallow a prosecutor’s decision to waive the right to seek post-incarceration civil commitment in exchange for a guilty plea to a sex offense).

214. MO. REV. STAT. § 632.489 (1999).

215. MO. REV. STAT. §§ 632.492, 632.495 (1999). As has been discussed, the likelihood of a jury failing to return a commitment order in these cases is extremely low.



Most importantly, because Missouri considers these cases to be civil matters rather than criminal in nature, normal rules of criminal procedure and evidence do not apply. Instead, the state is free to call the past victims of the sex offender, introduce evidence of prior bad acts, and force the sex offender to testify against himself in the form of the mandated psychological interviews by the State.<sup>216</sup> Such clear violations of the constitutional protections afforded a defendant in a criminal proceeding are justified by the civil label that is applied to the commitment proceedings.<sup>217</sup>

The problems created by this withdrawal of certain rights in the civil setting in Missouri, and the confusion in the courts over the civil/criminal dichotomy, is blazingly apparent in a recent decision, *Ingrassia v. State*.<sup>218</sup> In that case the Missouri Eastern District Court of Appeals dismissed the appeal of Ingrassia, who was twice convicted of crimes of sexual misconduct and ordered committed by a jury as a sexual predator in April 2001.<sup>219</sup> The State moved for the dismissal of Ingrassia's appeal on the basis of the "escape rule," a judicially created doctrine in Missouri "that operates to deny the right of appeal to a defendant who escapes justice."<sup>220</sup> Although the rule had only previously been applied to criminal cases (and thus refers to the "defendant" escaping), the court decided to extend the rule to civil commitment proceedings involving an individual committed under the sexually violent predator statutes. The court rationalized this decision by arguing that Ingrassia had removed himself from their control, had created several administrative difficulties, and the state was justified in trying to discourage escape by sexually violent predators committed to institutions because Ingrassia's escape

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216. For criticism of similar encroachment on the rights of defendants in criminal cases involving sexual offenses through the use of modified rules of evidence, see Moreno, *supra* note 212, and James J. Duane, *The New Federal Rules of Evidence on Prior Acts of Accused Sex Offenders: A Poorly Drafted Version of a Very Bad Idea*, 157 F.R.D. 95 (1994). *But see* Sherry L. Scott, *Fairness to the Victim: Federal Rules of Evidence 413 and 414 Admit Propensity Evidence in Sexual Offender Trials*, 35 HOUS. L. REV. 1729 (1999).

217. It could be argued that the sexual predator statutory requirements that precede a civil commitment hearing overcome these evidentiary and jury concerns. These requirements include diagnosis by a state psychiatrist as having a mental disorder, designation by a state official as a sexual predator, and a preliminary hearing before a judge. Putting aside the scientific disputes regarding diagnosis of sex offenders (*see supra* Section II, Part C) and the need to guarantee constitutional protections at trial despite whatever might precede it, a number of cases reveal the fact that questionable commitment decisions still occur. A good example of these problems involve commitment as sex offenders of people who are clearly suffering from "normal" mental illnesses. *See, e.g.,* *People v. Moore*, 2002 WL 2017087, No. B152102 (Cal. Ct. App. Sept. 4, 2002) (committing a diagnosed paranoid schizophrenic as a sexual offender).

218. 2002 WL 31749394, No. ED 80012 (Mo. Ct. App. Dec. 10, 2002).

219. *Id.* at \*1.

220. *Id.* at \*1-2. (quoting *State v. Troupe*, 891 S.W. 2d 808, 809 (Mo. 1995) (en banc)). Ingrassia had "escaped" from a mental institution in October 2002. *Id.* at \*1.

“demonstrates disrespect for our system of justice.”<sup>221</sup> The Missouri Court’s solution to the above concerns was an application of a criminal remedy to a supposedly civil proceeding which, in effect, denies this group of individuals the ability to have their rights adequately protected. Better evidence of the difficulties in keeping the criminal versus civil distinction clear on the part of judicial actors is hard to find and point to the inherent deficiencies in maintaining the constitutionality of the statutes involved by a declaration that they are civil in nature.<sup>222</sup>

## VI. CONCLUSION

The Kansas Supreme Court described the dangers of the approach to sexually violent predators that has been adopted by the states and approved by the U.S. Supreme Court in the following manner:

[It has] the insidious effect of sanctioning the separation of the commitment of sexually violent predators from the statutory procedure for the commitment of the mentally ill. Once that is accomplished, the same reasoning could be applied to anyone who commits any designated offense and is labeled “mentally abnormal” or suffering from an “anti-social personality disorder.”<sup>223</sup>

This observation highlights the following two major theses of this Note: first, that a jury that is not required to make a finding as to lack of control fails to reach the constitutional standard established in *Crane* and second, such an instruction, if given, will fail to overcome the inherent deficiencies of a civil commitment scheme for sex offenders.

Public concern and fear of sex offenders will almost universally guarantee a decision of commitment regardless of any constitutional restraints placed before the jury.<sup>224</sup> The ability of state governments to eradicate the rights and protections of sex offenders through civil statutes shows the dangerous way in which these powers can be used to infringe on constitutional rights. Efforts to civilly commit other groups of people deemed dangerous show the lack of limits to this perverse line of reasoning.<sup>225</sup> When the costs and prior failures of

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221. *Id.* at \*3.

222. See generally Polin, *supra* note 212, for an analysis of possible rules of procedure for one sexually violent predator statutory scheme.

223. *In re Hendricks*, 912 P.2d 129, 136 (Kan. 1996).

224. See Michelle Johnson, *The Supreme Court, Public Opinion, and The Sentencing of Sexual Predators*, 8 S. CAL. INTERDISC. L.J. 39 (1998) (arguing that *Hendricks* is an example of the Court bowing to public concern despite the absence of solid constitutional footing); Robert Billbrey, *Civil Commitment of Sexually Violent Predators: A Misguided Attempt to Solve a Serious Problem*, 55 J. MO. BAR 321 (1999); Grant H. Morris, *The Evil That Men Do: Perverting Justice to Punish Perverts*, 2000 U. ILL. L. REV. 1199 (2000).

225. For efforts on commitment of pregnant drug addicts and substance abusers, see David F. Chavkin, “*For Their Own Good*”: *Civil Commitment of Alcohol and Drug-Dependent Pregnant Women*, 37 S.D. L. REV. 224 (1992); Jean R. Schroedel & Pamela Fiber, *Punitive Versus Public*

such a system are factored in, it becomes obvious that punitive measures should be reserved for the states' criminal justice systems, where fears and treatment of sexual offenders can more properly be addressed. Under this light, civil commitment can be seen as endemic of a criminal justice system that focuses on punishment rather than rehabilitation, resulting in a system forced to deal with convicts of all types who are likely to recommit.

NATHANIEL E. PLUCKER\*

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*Health Oriented Responses to Drug Use by Pregnant Women*, 1 YALE J. HEALTH POL'Y L. & ETHICS 217 (2001); Mara L. Krongard, *A Population at Risk: Civil Commitment of Substance Abusers After Kansas v. Hendricks*, 90 CAL. L. REV. 111 (2002).

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