

Preventive Detention of Sex Offenders

David J. Gottlieb*

I. INTRODUCTION

The new generation of sexual predator (SVP) laws,¹ which provide long-term preventive civil confinement of sex offenders, present temptations for our elected representatives and challenges for our courts. During the past generation, society has come to believe that criminal penalties for violent crime or sexual abuse cases have been far too lenient. One predictable, and constitutionally uncontroversial, response has been a general increase in criminal penalties for sex abuse offenses. During the 1980s and 1990s, our State in fact consistently increased such penalties.² Because these new laws could only act prospectively, the State faced the additional question of how and whether to respond

* Professor, University of Kansas School of Law. As Dean McAllister notes, we have represented opposing parties in a number of cases involving sex offenders, including cases involving sex offender registration acts and the civil commitment laws that are the heart of our two Essays. I have had the pleasure of debating these issues with Dean McAllister at a number of different fora at the Law School and at New York University. I am not currently engaged in representation on these issues, and the positions I express in this article are my best efforts as a scholar to deal with the questions. While the views are my own, I acknowledge a debt of gratitude to Professor Eric S. Janus, William Mitchell College of Law, whose work on this issue has influenced me a great deal. For a sampling of his work on this topic, see Eric S. Janus, *Hendricks and the Moral Terrain of Police Power Civil Commitment*, 4 PSYCH. PUB. POL'Y & L. 297 (1998) [hereinafter *Moral Terrain*]; Eric S. Janus, *Preventing Sexual Violence: Setting Principled Constitutional Boundaries on Sex Offender Commitments*, 72 IND. L.J. 157 (1996) [hereinafter *Preventing Sexual Violence*]; Eric S. Janus, *Toward a Conceptual Framework for Assessing Police Power Commitment Legislation: A Critique of Schopp's and Winick's Explications of Legal Mental Illness*, 76 NEB. L. REV. 1, 9 (1997) [hereinafter *Police Power Commitment*].

1. In the first half of the twentieth century, a number of states passed "sexual psychopath" laws, most of which provided for treatment of sexual psychopaths in lieu of punishment. See *Minnesota ex rel. Pearson v. Probate Court*, 309 U.S. 270, 277 (1940) (holding that a Minnesota "sexual psychopath" statute was not patently defective and was not construed to deprive persons of due process). Over time, most states repealed or abandoned use of the statutes. Janus, *Preventing Sexual Violence*, *supra* note *, at 158 n.7.

2. The Kansas Sentencing Guidelines, which began our determinate sentencing system, increased substantially the terms possible for sex offenders. Our legislature, on several occasions, has increased penalties for certain violent and sex offenses. See 1993 Kan. Sess. Laws 253, §§ 2, 11 (requiring registration of sex offenders and imposing enhancement); 1994 Kan. Sess. Laws 341, § 1 (increasing most serious non-drug penalties); 1995 Kan. Sess. Laws 251, § 25 (eliminating traditional insanity defense); 1996 Kan. Sess. Laws 258, § 10 (increasing most severe sentences), § 3 (increasing severity level for rape); 1999 Kan. Sess. Laws 164, § 17 (increasing most serious non-drug penalties).

to inmates already sentenced under previous law. Eventually, our State, like several others, passed an act providing for civil commitment of sex offenders awaiting release from their prison terms.³

While the Acts are politically popular, they carry with them significant potential for abuse. The suspension of the “great safeguards which the law adopts in the punishment of crime and the upholding of justice”⁴ and the use of civil commitment against criminally responsible individuals is an assumption of power that ought to concern us greatly. As much potential for abuse as there is in the awesome power of the government to punish crime, there is perhaps even more in government deprivations of liberty for “preventive” purposes.

The debate between Dean McAllister and myself does not concern society’s right to protect itself from sexual offenders or the propriety of long terms of incarceration for those properly convicted. Nor, in my view, is it a question of whether one or the other of us is enshrining our policy preferences in the Constitution. Rather, our debate is over whether there are constitutional restraints placed upon the government’s ability to engage in preventive detention—the imprisonment of individuals for what they might do, rather than for what they have done—and about what those restraints might be. My position, which I will elaborate below, is that our historical traditions and constitutional protections of individual autonomy and liberty insist that the criminal process be the central means of social control of dangerous behavior, with civil commitment standing as a limited exception available for those individuals for whom the criminal process is unlikely to be effective. These principles do not argue for any particular definition of mental illness. But they do require that whatever definition is adopted separate out a limited class of individuals, and that the class further separate those who are able to decide whether to abide by the law from those who are not. Thus, I disagree with Dean McAllister’s view which, as I understand it, places virtually no limit on the State’s power to define mental illness, and therefore, to preventively confine criminally responsible individuals. I also believe my view is at least consistent with, if not required by, the positions reached by the Supreme Court of the United States in a series of cases that culminate with *Kansas v. Crane*.⁵

3. David Boerner, *Confronting Violence: In the Act and in the Word*, 15 U. PUGET SOUND L. REV. 525 (1992). Boerner served on the task force that drafted the Washington Sexually Violent Predator Act, the first of the new generation of civil commitment statutes.

4. *Cooper v. Oklahoma*, 517 U.S. 348, 366 (1996) (quoting *United States v. Chisolm*, 149 F. 284, 288 (C.C. Ala. 1906)).

5. 122 S. Ct. 867 (2002).

My other disagreement with Dean McAllister concerns our views of the deference given to state legislative judgments concerning some of these questions. I take the position that the pressure to protect society against crime in general, and sexual crimes in particular, will cause legislators to do what they can to appear to protect us. If this purpose sometimes requires them to package criminal punishment as civil regulation in order to avoid the “technicalities” in the criminal process, the State will undoubtedly make the effort. I believe the deferential view given to state legislative designations in deciding whether an enactment is civil or criminal is therefore somewhat unrealistic. This is particularly the case if the Supreme Court ignores the state courts’ views of the circumstances surrounding the enactment of such statutes.⁶ I therefore conclude that the view of a bare majority of the Supreme Court of the United States that the Kansas Sexual Predator Act was not intended as punishment is incorrect.⁷ Because both of these propositions concern the place not just of civil commitment, but of the criminal process, I begin there.

II. SUBSTANTIVE DUE PROCESS

A. *The Place of the Criminal Process*

Each year we begin our Criminal Procedure course with a discussion of some of the attributes characteristic of criminal cases. All criminal litigation is initiated by the government. The governmental plaintiff has at its disposal its own investigative army. It has the power to temporarily incapacitate the defendant pending the outcome of litigation. If it prevails, it may impose sanctions that include temporary or permanent

6. It would seem to me that sincere federalism requires a minimum amount of respect for the decisions of state courts, as well as state legislatures, and some hesitancy to rush to assail the motives of judges who issue decisions with which the Justices of the United States Supreme Court disagree. Anyone accepting this yardstick will be deeply disappointed by the tone of Justice Scalia’s dissent in *Crane*. His description of the Kansas Supreme Court’s decision in *Crane* as motivated by the fact that the court “still did not like the law,” and his argument that the majority’s opinion encourages state courts to “ignore” the Supreme Court’s decision, evinces a profound distrust of state court opinions. *Crane*, 122 S. Ct. at 876 (Scalia, J., dissenting). Justice Scalia does not seem to accept the possibility that, in this case, the Kansas Supreme Court’s decision was motivated by its view of the requirements of the Constitution, rather than its like or dislike of the SVP law, and that the Kansas Supreme Court was laboring to follow, rather than avoid, the Court’s opinion in *Kansas v. Hendricks*, 521 U.S. 346 (1997), when it decided *Crane*.

7. See *Kansas v. Hendricks*, 521 U.S. 346, 371 (1997) (holding that the “Kansas Sexually Violent Predator Act comports with due process requirements and neither runs afoul of double jeopardy principles nor constitutes an exercise in impermissible *ex post facto* lawmaking”).

deprivation of liberty. And if it prevails, it wins the right to assign moral blame to the offender.

This is awesome power, but it is appropriate that government exercise it. Criminal punishment is our basic defense against internal violence. We hope that our criminal penalties will deter individuals from committing crime and we declare our willingness to incapacitate those who violate the norms. We expect criminal penalties to help stem harmful conduct, and when the penalties do not, we seek to change them. We rely upon these penalties to provide retribution. The success of these goals requires the exercise of force, and effective governments possess a monopoly on the ability to exercise such force.⁸

It is appropriate, then, that government be granted the power to protect us via the criminal process. Nevertheless, the tremendous powers granted government must be restrained. If failed states are the product of regimes where government is inadequately armed, police states are the products of regimes where government is inadequately restrained. In our system, we have developed at least two types of restraints upon abuse of the power to punish and incarcerate.

First are the substantive restraints—criminal penalties that may be imposed only for prior conduct, not for status.⁹ Such conduct should be blameworthy, and it must be declared in advance to be illegal.¹⁰ Our respect for autonomy requires that individuals have a choice whether to violate the law, and our belief in the moral force of the criminal law presupposes that most individuals have the capacity to choose.

The second category of restraints are procedural limitations enacted, among other reasons, to protect against government condemnation of those actually innocent, or to protect against forms of government abuse in the course of its decision to punish. Thus, we require that conviction occur only after the government has established proof beyond a reasonable doubt; we require confrontation and cross-examination, and the right to counsel.¹¹ We prohibit the government from requiring an indi-

8. Societies that fail to function still operate through force, but via private rather than public actors. The privatization of protection is almost always a disaster. Indeed, because the ability to exercise a monopoly on force is the defining characteristic of government, the inability to achieve that monopoly is the defining characteristic of what we call "failed" states.

9. *Robinson v. California*, 370 U.S. 660, 666 (1962).

10. U.S. CONST. art. I, § 10; art. I, § 9, cl. 3.

11. *Id.* amend. XI.

vidual to be a witness against himself.¹² The government may only punish once, and it may not retroactively increase penalties.¹³

The existence of these restraints obviously implies at least *some* measure of exclusivity in the use of the criminal sanction. If the government may simply recast its criminal proceedings as civil, it may be able to accomplish the goals it might otherwise achieve only through punishment by a simple change in nomenclature. If the government consciously attempts to circumvent the restraints imposed in criminal proceedings by casting off their limitations, such subterfuge must be blocked. Thus, the government may not avoid the restriction against multiple punishment that is a part of the prohibition against double jeopardy by simply labeling a second punishment as "civil."

B. Civil Commitment of the Mentally Ill

Traditionally, the power of the State to civilly commit the mentally ill has been predicated upon two different rationales, *parens patriae* and police power.

Under the theory of *parens patriae*, the State-as-parent is given the power to care for citizens who are unable to care for themselves. Under this theory, the State may restrain the individual, but such restraint must be for the individual's own good.¹⁴ The classic formulation of commitments under the doctrine of *parens patriae* requires at least three predicates. First, of course, is that the individual must be mentally ill. Second, the mental illness must be such that the individual is unable to make competent decisions about his need for medical treatment. The State has no business acting as parent and mandating treatment—and incarceration—for a mentally competent individual who does not desire it. Third, the State may commit the individual if the commitment is "therapeutically appropriate" for the individual¹⁵—in most cases, there must be some form of treatment that accompanies incarceration.¹⁶

A second theory for civil commitment of the mentally ill turns on the State's police power. Under this theory, the State is permitted to

12. *Id.* amend. V.

13. See *id.* amend. V (prohibiting double jeopardy); *id.* art. I, § 10; art. I, § 9, cl. 3 (prohibiting ex post facto laws).

14. Janus, *Moral Terrain*, *supra* note *, at 302.

15. *Id.* at 302–07; Bruce J. Winick, *Ambiguities in the Legal Meaning and Significance of Mental Illness*, 1 PSYCHOL. PUB. POL'Y & L. 534, 547 (1995).

16. *Addington v. Texas*, 441 U.S. 418, 426 (1979).

detain individuals who are mentally ill and who, as a consequence of their mental illness, pose a danger to the community.¹⁷ Under the police power theory, it is the State, not the detainee, whose interests are being served. In its most robust form, police power commitments require only two bases. First, the individual must be mentally ill. Second, the mental illness must cause the individual to be imminently dangerous to the community.¹⁸ Strictly speaking, police power commitments need not turn on whether the detainee has the capacity to determine what is best for him. Since society's safety is at stake, if the danger is sufficient, the police power should support the detention of even a mentally competent individual. Moreover, treatment should not be the key to a valid commitment. Again, it is the State's interest that is paramount here. If the mentally ill individual is an imminent danger, the police power theory would support commitment even if no effective treatment were available for the individual.

Although these two theories rely on separate powers, traditional civil commitment law has tended to blend them together, and in theory suggests that they may be jointly necessary for civil commitment. For example, the Kansas statute on civil commitment of the mentally ill provides for commitment of a mentally ill person. Such person must suffer from a "severe mental disorder to the extent that such person is in need of treatment; [must lack] capacity to make an informed decision concerning treatment; and [must be] likely to cause harm to self or others."¹⁹ Thus, under this statute, while police power is a basis for commitment, it may only be exercised over individuals for whom commitment under *parens patriae* would seemingly be appropriate.

Prior to *Kansas v. Hendricks*,²⁰ the Supreme Court was arguably ambiguous about the bases underlying civil commitment. Thus, in *Addington v. Texas*,²¹ a case dealing with the burden of proof in civil commitment cases, the Court identified both a *parens patriae* power of the State to provide care to citizens "unable because of emotional disorders to care for themselves," and a "police power to protect the community from the dangerous tendencies of some who are mentally ill."²² In subsequent cases dealing with what were clearly police power commitments,

17. Winick, *supra* note 15, at 582.

18. *Id.*

19. KAN. STAT. ANN. § 59-2902(h)(1)–(3) (1994 & Supp. 2001).

20. 521 U.S. 346 (1997).

21. 441 U.S. 418 (1979).

22. *Id.* at 426.

the Court continued to offer *parens patriae* justifications for the incarcerations.²³

Kansas v. Hendricks resolved this issue.²⁴ In his opinion, Justice Thomas clearly validates police power commitments. The commitment in *Hendricks* was not made “for his benefit.” The decision to commit Hendricks was not made by Hendricks, and it was not made on his behalf because he could not decide for himself whether to seek treatment. The State never argued that Hendricks was incompetent to make decisions about whether he could benefit from treatment, nor could it. Nevertheless, the Court upheld the power of the State to commit to protect public safety.²⁵ The Court was also unpersuaded by the argument that the possible lack of treatment for Hendricks’ condition invalidated his confinement. The Court declared that confinement of a mentally ill person might be permissible where no treatment were provided if, in fact, no treatment were possible.²⁶ Justice Thomas declared: “we have never held that the Constitution prevents a State from civilly detaining those for whom no treatment is available, but who nevertheless pose a danger to others.”²⁷

C. Over the Line—The Invalidity of Preventive Detention

While incapacitation of mentally ill individuals who are dangerous is permissible, and while incapacitation without blame is therefore a valid “non-punitive” purpose, the State does not have the right to detain all dangerous individuals who threaten harm. Preventive detention of sane individuals is not constitutional, even if the individuals in question may pose a danger to the community. The Supreme Court case that speaks most directly (if sometimes unclearly) to this question is *Foucha v. Louisiana*,²⁸ decided approximately five years before *Hendricks*. Foucha was charged with aggravated burglary, but acquitted by reason of insanity.²⁹ Pursuant to Louisiana law, he was automatically committed to a mental

23. See *Jones v. United States*, 463 U.S. 354, 368 (1983) (stating that “the purpose of commitment following an insanity acquittal, like that of civil commitment, is to treat the individual’s mental illness and protect him and society from his potential dangerousness”).

24. 521 U.S. 346 (1997).

25. *Id.* at 366.

26. *Id.*

27. *Id.*

28. 504 U.S. 71 (1992).

29. *Id.* at 73.

facility.³⁰ In 1988, doctors recommended that he be released.³¹ The doctors certified that Foucha was no longer psychotic, but in part due to his "anti-social personality," they were unable to say whether he nevertheless would pose a potential danger to society if released.³² Finding that Foucha had failed to carry the burden of proving that he was not dangerous, the court ordered his continuing confinement.³³

The Supreme Court struck down the Louisiana procedure for three reasons. Most importantly here, one of the three reasons was "substantive due process."³⁴ The Court held, in effect, that Louisiana could not detain Foucha once he recovered his sanity, even if the State could show that he presented a future danger to society.³⁵ The Court stated:

[T]he Due Process Clause contains a substantive component that bars certain arbitrary, wrongful government actions "regardless of the fairness of the procedures used to implement them." Freedom from bodily restraint has always been at the core of liberty protected by the Due Process Clause from arbitrary governmental action. . . .

....
[I]f Foucha committed criminal acts while at Flecia, such as assault, the State does not explain why its interest would not be vindicated by the ordinary criminal processes involving charge and conviction, the use of enhanced sentences for recidivists, and other permissible ways of dealing with patterns of criminal conduct. Had they been employed against Foucha when he assaulted other inmates, there is little doubt that if then sane he could have been convicted and incarcerated in the usual way.

....
Here . . . the State asserts that because Foucha once committed a criminal act and now has an antisocial personality that sometimes leads to aggressive conduct, a disorder for which there is no effective treatment, he may be held indefinitely. This rationale would permit the State to hold indefinitely any other insanity acquittee not mentally ill who could be shown to have a personality disorder that may lead to criminal conduct. *The same would be true of any convicted criminal, even though he has completed his prison term. It would also be only a step away from substituting confinements for dangerousness for our present system which, with only narrow exceptions and aside from permissible confinements for mental illness, incarcerates only those who are proved beyond reasonable doubt to have violated the criminal law.*

"In our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception."³⁶

30. *Id.*

31. *Id.* at 74.

32. *Id.* at 74-75.

33. *Id.* at 75.

34. *Id.* at 80.

35. *Id.* at 80-81.

36. *Id.* at 80-83 (citations omitted) (emphasis added).

Foucha at least suggests that indefinite non-criminal confinement of dangerous but sane individuals is unconstitutional. Only individuals whose incarceration is a “permissible confinement” for mental illness may be detained.³⁷ *Foucha* also presupposes some principled dividing line between those presumed sane and those subject to commitment on the basis of mental illness. It ought to be obvious that the opinion is meaningless if the State may merely classify convicted criminals as insane—if Louisiana can respond to the issues raised by merely reciting that a “personality disorder” is the same thing as insanity.

D. Constitutional Standards for Mental Illness—From Foucha to Crane

There is no doubt that states can, and should, have great leeway in defining mental illness. It would stand to reason that definitions of mental illness have changed over time, as our understanding of the basis of mental illness has changed. But notwithstanding the variety of terms that have been employed, most mental illness designations used in the past have not threatened the distinction between mental illness commitments and a broader preventive detention authority that *Foucha* at least implicitly rejects. The standards for commitment in Kansas prior to the SVP Act certainly presented no such problems. Such confinements are only permissible for individuals suffering a “severe mental disorder” involving a “serious impairment” involving “substantial” behavioral or mental dysfunction.³⁸ Such individuals cannot be committed against their will unless they are so impaired as to be unable to make informed decisions about treatment.³⁹ Severe cognitive dysfunction is a minimum requirement. Individuals so ill are a small group, unlikely to be deterred by criminal sanctions, and, indeed, often so severely impaired as to be insane. While our previous standard is by no means constitutionally required, it is illustrative of the extent to which individuals civilly committed were assumed to be detached from reality, unable to care for themselves, or both.⁴⁰

37. *Id.*

38. See KAN. STAT. ANN. §§ 59-2917 (1994 & Supp. 2001) (outlining the procedures for involuntary confinement of a mentally ill person), 59-2902(h)(1) (defining a mentally ill person to be one suffering from, inter alia, a “severe mental disorder”), 59-2902 (defining severe mental disorder as a “serious impairment” involving “substantial” dysfunction).

39. See *id.* §§ 59-2917 (outlining the procedures for involuntary confinement of a mentally ill person), 59-2917(h)(2) (defining a mentally ill person as one who lacks decision-making capacity).

40. See, e.g., *Addington*, 441 U.S. at 421 (stating that “two psychiatrists . . . expressed opinions that appellant suffered from psychotic schizophrenia”); *O’Connor*, 422 U.S. at 565 (noting that the

The Kansas SVP Act is a dramatic departure from these limited civil commitment statutes. It does not require, for commitment, a mental illness that renders the individual unable to care for himself, to apprehend reality, or even to control his behavior. Rather than being targeted at individuals who might be regarded as insane, it is directed toward the incarceration of individuals who are found to be criminally responsible for their conduct. The Act permits incarceration of individuals who possess a "mental abnormality" or "personality disorder" predisposing the individual to crimes of sexual violence.⁴¹ Mental abnormality is defined as a "condition affecting the emotional or volitional capacity which predisposes the person to commit sexually violent offenses."⁴² Personality disorder is not defined at all.⁴³ While one could argue that the Kansas Act's definition means almost anything, I will accept the definition argued by the State—that the mental abnormality required by the statute is some recognized mental condition.

But the requirement that, before conviction, the individual possess some identifiable mental disorder is simply not a significant limitation on the State's ability to confine. Mental abnormalities include such conditions such as alcoholism, insomnia, learning disorders, eating disorders, and other psychological conditions possessed by individuals we have always thought of as sane.⁴⁴ More importantly, perhaps, personality disorders include "antisocial personality disorder," a condition possessed by anywhere from 40% to 75% of convicted criminals.⁴⁵ Under the literal terms of the SVP Act, indefinite confinement of individuals possessing this "chronic condition" characterized by "a pervasive pattern of disregard for, and violation of, the rights of others" is permissible, so long as the other requirements of the Act are met.⁴⁶

defendant was found to be suffering from "paranoid schizophrenia"); *Jones*, 463 U.S. at 359–60 (stating that "a hospital psychologist submitted a report to the court stating that petitioner . . . suffered from '[s]chizophrenia, paranoid type'").

41. See *id.* § 59-29a02(a) (Supp. 2001) (defining "sexually violent predator" as one with a mental abnormality or personality disorder that predisposes the individual to crimes of sexual violence).

42. *Id.* § 59-29a02(b).

43. See *id.* § 59-29a02 (failing to define personality disorder).

44. See DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 13–24 [hereinafter DSM-IV] (providing a list of mental disorders discussed throughout the DSM-IV).

45. See *Crane*, 122 S. Ct. at 870 (noting that epidemiological studies have found "that 40%–60% of the male prison population is diagnosable with Anti-social Personality Disorder") (citing Moran, *The Epidemiology of Antisocial Personality Disorder*, 34 SOC. PSYCHIATRY & PSYCHIATRIC EPIDEMIOLOGY 231, 234 (1999)); *In re Crane*, 269 Kan. at 585, 7 P.3d at 290 (noting that the State's expert testified that "probably more than 75% of the prison inmates suffer from antisocial personality disorder").

46. See DSM-IV, *supra* note 44, at 645.

Of course, the SVP Act does not purport to incarcerate all individuals with a mental disorder that predisposes them toward crime, but rather *convicted* criminals (primarily) with a predisposition to commit sex crimes.⁴⁷ But neither of these restrictions is of any constitutional significance. A large number of offenders of many different kinds may be predicted to reoffend.⁴⁸ Recidivism rates for sex crimes, in fact, are not significantly higher than many other categories of crime.⁴⁹ There would, therefore, be no additional basis for attacking a civil commitment law targeting individuals predisposed to commit crimes of violence or crimes against property, as well as sex crimes. Nor is there any constitutional requirement that a state limit a commitment law to convicted criminals. If the Act is truly civil, it should be applicable to any members of the population who are “likely” to commit future acts of criminal violence. Thus, the SVP Act at least threatens a regime of civil detention for individuals who possess a statistical likelihood of committing future crimes.

Notwithstanding these dangers, in *Hendricks*, the Supreme Court upheld the constitutionality of the SVP Act when challenged by a pedophile involuntarily committed under it.⁵⁰ As I stated in a KU Law public forum on the issue with Dean McAllister, for purposes of deciding the constitutionality of the SVP Act, *Hendricks* was not an ideal respondent. Possessed of a long history of offenses against children, *Hendricks* also admitted that his conduct was the product of his inability to control his urges. He explained that he repeatedly abused children when not confined and that when “stressed out” he was likely to reoffend.⁵¹ Although *Hendricks* expressed the hope, at his commitment hearing, that he would not repeat his behavior, he admitted that the only way he could be stopped would be “to die.”⁵²

In deciding the validity of *Hendricks*’ commitment and the constitutionality of the SVP Act, the Court returned, over and over again, to the importance of *Hendricks*’ inability to control his behavior, and ultimately upheld the validity of his civil commitment. In the beginning of

47. See KAN. STAT. ANN. § 59-29a02(a) (1994 & Supp. 2001) (requiring a “mental abnormality or personality disorder which makes the person likely to engage in repeated acts of sexual violence”).

48. Brief for Amici Curiae American Psychiatric Association and American Academy of Psychiatry and the Law at 17-18, *Kansas v. Crane*, 122 S. Ct. 867 (No. 00-957) [hereinafter APA Brief].

49. Robert R. Wettstein, *A Psychiatric Perspective on Washington’s Sexually Violent Predator Statute*, 15 U. PUGET SOUND L. REV. 597, 603 (1992); APA Brief, *supra* note 48, at 17.

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

51. *Id.* at 355.

52. *Id.*

its opinion, the Court described its understanding of civil commitment laws as designed to incarcerate "people who are unable to control their behavior and who thereby pose a danger to the public health and safety."⁵³ The Court found previous mental health statutes to target "those who are unable to control their dangerousness."⁵⁴ In discussing *Hendricks*, the majority opinion emphasized his inability to control himself.⁵⁵ Finally, on a number of occasions the Court described the SVP Act as consistent with precedent because it limited the class of individuals committed to those "who are unable to control their dangerousness."⁵⁶

Hendricks did not expressly state whether the Court believed that due process required a finding, in each commitment case, that the individual is "unable" to control his behavior. One can argue that the Court's limiting language in *Hendricks* was included to describe the reasons for the commitment statute, rather than stand as a substantive limit on commitment. On the other hand, it certainly is possible to read the language explaining civil commitment in *Hendricks* as imposing a requirement that whatever mental disorder might be found must produce "an impairment of the ability to control sexually violent behavior."⁵⁷ By requiring that a mental condition produce an inability to control behavior, the Court would accomplish the function of limiting civil commitment for sex offenders to a limited class of offenders who were most unlikely to be deterred by the threat of criminal sanctions.

*Crane*⁵⁸ squarely raised the question of volitional control, and it essentially adopted the reading of *Hendricks* and *Foucha* that I have suggested. Michael Crane was committed at the end of his sentence for aggravated sexual battery.⁵⁹ He was diagnosed as suffering from exhibitionism and antisocial personality disorder (the same disorder that plagued *Foucha* after he recovered his sanity).⁶⁰ At his commitment proceeding, Crane requested that the jury be instructed that it could not commit him unless it found that he was unable to "control his dangerous behavior."⁶¹ The trial court rejected this request, and concluded

53. *Id.* at 357.

54. *Id.* at 358.

55. *Id.* at 365.

56. *Id.* at 358.

57. Janus, *Police Power Civil Commitment*, *supra* note *, at 312. In his analysis of *Hendricks*, published in 1998, Professor Janus effectively predicted the Court's decision in *Crane*.

58. 122 S. Ct. 867 (2002).

59. *Id.* at 869.

60. *Id.*

61. *Id.*

that the jury need only find that Crane was suffering from a personality disorder that made him likely to engage in future predatory acts of sexual violence.⁶²

The Kansas Supreme Court reversed Crane's commitment, holding that a constitutionally valid commitment required a showing that Crane was "unable to control" his behavior.⁶³ The State sought review in the United States Supreme Court, arguing that a requirement that an inmate be "completely unable" to control his behavior was unnecessary and unworkable.⁶⁴ The State also argued that no finding on the matter need be made.⁶⁵ The Supreme Court accepted the State's view that it need not show that an inmate is "completely unable" to control his behavior, but it nevertheless held that some showing of lack of control was necessary for a valid commitment.⁶⁶ Justice Breyer concluded that, in order to commit an inmate such as Crane, the State must at least show that the individual has "serious difficulty in controlling behavior."⁶⁷ Such difficulty, when added to 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."⁶⁸

These distinctions in control—"complete inability," "inability," "serious difficulty"—may seem hypertechnical.⁶⁹ They also leave the Court open to the criticism that it is practicing in an area—psychiatry—that is beyond its expertise. It seems to me, however, that the Court's opinion is a predictable effort to set *some* boundary on the State's ability to equate deviance and criminality, while preserving great freedom of action in the actual setting of the definitions of mental illness.⁷⁰

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.* at 870.

66. *Id.*

67. *Id.*

68. *Id.*

69. Although I will only deal with this point in a footnote, I disagree that any of the above standards would make it impossible, or even terribly difficult, for the State to carry its burden in a commitment proceeding. It may well be that psychiatrists are uncomfortable with diagnoses of control impairment, but such diagnoses are given all the time. The seminal sexual psychopath statute in Minnesota spoke about commitment of individuals showing "an utter lack of power to control their sexual impulses." *Pearson*, 309 U.S. at 274. Insanity cases have litigated questions of "substantial capacity" to control behavior, or irresistible impulses, for generations.

70. To the extent that Dean McAllister argues that volitional control should not be a talisman of mental illness, I agree. One can certainly imagine individuals with mental conditions predisposing

E. Some Points of Elaboration

I believe that the central message of the *Foucha* and *Crane* cases is their repetition of the notion that civil commitment for the mentally ill is an exception to the "rule" that the criminal process is the primary means of social control. The State may not confine sane dangerous individuals merely based upon a prediction that they are likely to (re)offend. This is true even if the State can show that it has a valid interest in seeking to confine an individual. Thus, it is not enough for the State to justify confinement of an individual by balancing potential harm to the State against harm to the individual. Even if the State could establish, in a civil proceeding, that an individual was likely to commit future crimes unless incarcerated, the State would not be able to rely upon its police power to commit the individual.⁷¹

A logical corollary of this position is that in order to support civil commitment for a mentally ill individual, the State must do more than demonstrate the existence of a mental condition that predisposes the individual toward violence, whether sexual or otherwise. Individuals possess all kinds of backgrounds or personalities that may predispose them toward the commission of crime. Individuals who have previously committed crimes or individuals who were abused as children, to cite just two characteristics, may be predisposed to certain types of criminal behavior. The State may not, however, rely upon abuse or prior criminality to support preventive detention, even if it could prove, in a par-

them toward sexual violence whose problem might consist of cognitive, rather than volitional, impairment. Since cognitive, as well as volitional, impairment may render individuals effectively undeterrable, there is no reason why such impairment would be inappropriate as a basis for commitment. But neither *Foucha's* nor *Crane's* mental difficulties resulted in impaired cognitive functioning, so it is not a terrible surprise that the issue was not reached.

71. Some commentators have recently argued that society would be better served by acknowledging a power to incapacitate dangerous offenders outside of the criminal process. Michael Louis Corrado, *Punishment and the Wild Beast of Prey: The Problem of Preventive Detention*, 86 J. CRIM. LAW & CRIMINOLOGY 778, 779-80 (1996); Paul H. Robinson, *Foreword: The Criminal-Civil Distinction and Dangerous Blameless Offenders*, 83 J. CRIM. LAW & CRIMINOLOGY 693, 698-717 (1993). Both of these commentators take a position similar to Dean McAllister's, in that they argue that it does not benefit criminal defendants to straightjacket the government into using all of its detention power through the criminal process. Corrado, *supra*, at 788-91; Robinson, *supra*, at 698-706. It may be that these restrictions will simply cause the State to enact even stricter criminal punishments to make up for its inability to use targeted civil commitment. Although I do not believe that the possibility of civil incarceration after service of sentence has ever caused a legislature to give less of a punishment than it would have given without the statute, perhaps if these statutes become more prevalent, this concern would be appropriate. For the reasons I have stated, however, whatever the strength of these arguments as policy prescriptions, I do not believe they are consistent with current constitutional doctrine.

ticular case, that the abuse or criminality made the individual “likely” to commit certain crimes if not incarcerated.

Rather, in addition to requiring a showing of the existence of mental illness and possibility that the individual may commit future harm, the Constitution also requires a justification for dealing with the potential harm through civil rather than criminal confinement. The State need not show an exact congruence between criminal and civil sanctions. In other words, it need not show (as some commentators have suggested) that civilly committed individuals must be either incompetent or have available a defense of insanity.⁷² Some individuals may be both “bad” and “mad.” On the other hand, there are constitutional limits to the amount of overlap. The State must show, for sex offender commitments, why the individuals whom it incarcerates differ from “ordinary” criminals who commit sex crimes and for whom the threat of criminal sanction is the constitutionally allowable means of social control.

While it is fair to say that the Court has never elaborated its justification for this limit on police power commitments, it must come from our view of the types of protections that must be afforded when individuals are incarcerated, from our commitment to autonomy before deprivation of liberty, and from our view of the basic structure of the Constitution when dealing with criminal procedure matters. There are narrow exceptions where state deprivations of liberty can legitimately be justified by purposes other than criminal punishment. Thus, the State may detain individuals for carefully limited periods for purposes of quarantine of infectious disease, as these individuals may have no way of preventing themselves from infecting others.⁷³ Individuals who are mentally ill and

72. This position, or ones similar to it, has been supported by a substantial number of scholars writing over a long period of time. See, e.g., Donald Dripps, *The Exclusivity of the Criminal Law: Toward a “Regulatory Model” of, or “Pathological Perspective” on, the Civil-Criminal Distinction*, 7 J. CONTEMP. LEGAL ISSUES 199, 215–20 (1996) (discussing civil commitment); Janus, *Preventing Sexual Violence*, *supra* note *, at 209 n.248 (citing a number of earlier works); Stephen J. Schallhofer, *Two Systems of Social Protection: Comments on the Civil-Criminal Distinction, with Particular Reference to Sexually Violent Predator Laws*, 7 J. CONTEMP. LEGAL ISSUES 69, 94 (1996) (“SVP commitments should be impermissible in the absence of proof of mental illness and, moreover, a mental condition should satisfy this requirement only if it would be sufficiently serious to preclude criminal responsibility.”); Note, *Developments in the Law: Civil Commitment Of The Mentally Ill*, 87 HARV. L. REV. 1190, 1234 (1974) (suggesting that in civil commitments, “mental illness [must be] interpreted to mean a condition which induces substantially diminished criminal responsibility.”).

73. Although Dean McAllister cites quarantine as an example of the breadth of government power, it seems to me to stand for the opposite view. The hallmark of the government’s power to detain for quarantine is the fact that the quarantined individual cannot control the spread of his or her disease. This “inability to control” was obvious in cases decided during the early days of our country, when the means by which diseases spread was essentially unknown. If the mechanism of the

unable to control their behavior are also neither blameworthy nor deterable. But absent these situations, preventive detention is unconstitutional.

If I am correct about what the Court has actually done, and the reason it has done it, then I would predict that some of the concerns about *Crane* raised in Dean McAllister's Essay may prove unwarranted. First, there is no reason to believe that the limit in sex offender commitments will result in the overturning of state mental health laws, since those laws generally require a level of impairment vastly more substantial than sexual predator laws. Most mental health laws require severe cognitive or volitional impairments, or both.⁷⁴ Many require that the patient be unable to make decisions about care.⁷⁵ It is difficult to see the extremely modest standards suggested in *Crane* resulting in an overturning of state commitment laws that, unlike the SVP laws, do not target criminally responsible individuals. Nor is the decision in *Crane* likely to result in any regulation of substantive criminal law. The limitation imposed by *Foucha* and *Crane* preserves the centrality of the criminal law as a means of regulating social control. Neither opinion suggests any limitation on the ability of states to widen or narrow the reach of the sanction as they see fit.

III. THE CIVIL-CRIMINAL DIVIDE

Dean McAllister has described his abiding interest in federalism as a prime motivation for his becoming involved in sexual predator litigation. My interest was primarily related to the relationship of the SVP Act to constitutional criminal procedure restrictions. My concern was that the Act was an improper effort to avoid the constitutional prohibitions against double jeopardy and ex post facto laws by effecting a retroactive increase in sentences that the State, in hindsight, believed were too lenient. By a narrow margin, the Supreme Court rejected that characterization of the Act.⁷⁶ The Court accomplished this result by means of what

spread of disease is known, it may be possible to regulate the issue by criminal penalties. Thus, the calls in the early days of AIDS for quarantine by some individuals were premised on the absence of knowledge about how the disease is transmitted and the fear that individuals could unknowingly transmit it by casual contact with strangers. Now that we do know how the disease is transmitted, we do not suggest that HIV positive individuals be quarantined. Instead, we use the threat of criminal sanction to protect against knowing transmission of the illness.

74. Janus, *Moral Terrain*, *supra* note *, at 303 n.29; *see supra* notes 33-34 (detailing the Kansas Sexually Violent Predator Act).

75. *See id.*

76. *Hendricks*, 521 U.S. at 346.

I believe to be an overly deferential attitude toward the legislative enactment. In my view, some degree of scepticism is warranted when reviewing state legislative enactments that impose civil incarceration upon mentally responsible adults who have committed criminal conduct but who cannot be punished to the extent desired by the State. In such circumstances, there can be overpowering temptations for the State to attempt to circumvent the criminal process rather than live with its limitations. I believe that the State succumbed to this temptation when it enacted the SVP Act.

It certainly seemed to me at the time that the circumstances surrounding the enactment of the SVP law, not to mention the text of the Act, were causes for concern. Like the Washington SVP Act,⁷⁷ which Kansas adopted practically verbatim,⁷⁸ the Kansas SVP Act was the product of intense public outcry after the commission of a terrible crime by a former prisoner who had been released from his criminal sentence. In each state, task forces were formed, with the purpose of designing more severe sentences for individuals accused of sexual offenses.⁷⁹ In Kansas, the primary expression of this concern was a toughening of criminal penalties. Thus, the State added to its determinate sentencing law an enhancement for individuals designated as sexually violent predators,⁸⁰ increased sentences for violent offenders,⁸¹ and enacted a death penalty bill.⁸² But the task force struggled with the question of how to continue confinement of individuals who were entitled by law to their freedom at the end of their sentence. The task force wished to increase the sentence of these individuals but was unable to do so by criminal sanction because of the constitutional prohibition against *ex post facto*

77. WASH. REV. CODE ANN. §§ 71.09.010 to .120 (West 1992 & Supp. 1995).

78. KAN. STAT. ANN. §§ 59-29a01 to -29a20 (1994 & Supp. 2001).

79. See Thomas J. Weilert, *Thoughts on the Cost of Freedom*, 46 U. KAN. L. REV. 17, 19-20 (1997) (explaining the circumstances surrounding the formation of the Kansas task force); Boerner, *supra* note 3, at 538 (discussing the formation of the Washington task force).

80. The State already had a procedure for committing individuals for treatment during the course of their sentence, and it subsequently added requirements for participation in sex offender programs as a condition for parole or transfer. See KAN. STAT. ANN. §§ 59-29a07 (providing that "[i]f the court or jury determines that the person is a sexually violent predator, the person shall be committed to the custody of the secretary of social and rehabilitation services for control, care and treatment until such time as the person's mental abnormality or personality disorder has so changed that the person is safe to be at large"), 59-29a19 (providing that "[i]f the court determines that the person should be placed on conditional release, the court, based upon the recommendation of the treatment staff, shall establish a plan of treatment which the person shall be ordered to follow").

81. KAN. STAT. ANN. § 21-4704(j) (2001).

82. *Id.* § 21-4624.

laws and double jeopardy.⁸³ The task force therefore turned to possible civil remedies. The outcome of this concern was the SVP Act, a statute which promised the continued confinement of “dangerous sex offenders . . . past their scheduled prison sentence.”⁸⁴ Although confinement under the Act was designated as civil, it was troubling that its confinement was, in essence, limited to those already convicted of sex offenses.⁸⁵ It was also troubling that the “civil” treatment did not commence until the conclusion of the inmate’s criminal sentence.⁸⁶ Finally, it was troubling that the Act was in fact packaged to the legislature, by at least some of its proponents—including the then Attorney General and his successor—as an Act whose purpose was to provide essentially lifetime incarceration for a group of individuals who never should be released.⁸⁷

Ultimately, the majority found these difficulties insufficient to mandate a finding of the Act as criminal.⁸⁸ In reaching its conclusion, the Court relied both on the overtly civil and “non-punitive” character of the statutory language, and on the provision of treatment that was mandated as a part of each commitment.⁸⁹ To the extent that the majority in *Hendricks* found that the existence of treatment demonstrated the non-punitive nature of the Act, the opinion is unpersuasive.⁹⁰ Incapacitation and rehabilitation are characteristics of confinement of the mentally ill, but they are also characteristics of confinement of criminal offenders.

The Court also relied on the fact that the Act itself does not “affix culpability for prior criminal conduct” as a basis for its decision.⁹¹ It is true that the SVP Act is not punitive in the sense that it convicts the defendant of a new crime. The Act poses a constitutional problem, however, because it in effect extends the incarceration of prisoners for crimes already committed. A decision to extend by five years the incarceration of anyone convicted of a sexually violent offense who was found to be in need of treatment would not itself impose “culpability for prior criminal conduct,” but if imposed by a parole board during an in-

83. U.S. CONST. art. I, § 10; art. I, § 9, cl. 3.

84. This description of the bill was given by the Attorney General in his testimony to the legislature. Weilert, *supra* note 79, at 20.

85. The Statute does provide for possible commitment of individuals declared incompetent to stand trial or released at the end of a confinement following commitment pursuant to an acquittal on grounds of insanity. KAN. STAT. ANN. § 59-29a07 (1994 & Supp. 2001).

86. *Id.*

87. *Hendricks*, 521 U.S. 346, 384 (1997).

88. *Id.* at 368–69.

89. *Id.*

90. *Id.* at 367.

91. *Id.* at 362.

mate's sentence, such a decision would surely be regarded as extending criminal punishment. If eligibility for extended incarceration is confined to convicted criminals, it should not matter that the proceeding imposing the extended term does or does not itself affix blame.⁹²

In determining that the Act was civil, the Court relied most heavily on the legislative designation of the Act as civil and the deference required to be given to such state judgments.⁹³ But this standard ignores the overpowering temptations to punish again those whom we think have been treated too leniently. When confronted with an evil that threatens us, one that we believe we have been slow to recognize, there is an enormous temptation to circumvent the limitations imposed by the criminal process. We succumbed repeatedly to this temptation in our efforts to combat communism in the 1950s,⁹⁴ and I believe we did so again in *Hendricks*.

IV. CONCLUSION

If I am correct in my view of the dynamics of the SVP Act, one might expect the law to fade in importance. The current number of inmates incarcerated under the Act is not large. As more and more individuals convicted of sex crimes receive the long sentences now prescribed, we may feel less and less need to impose civil incarceration at the close of their sentence. We are only a couple of decades from our abandonment of a previous set of sexual psychopath laws.⁹⁵ Time will tell whether these laws meet the same fate. In the meantime, I am genuinely pleased to learn that the State is sincere in its undertaking to provide treatment, that treatment is occurring, and that some individuals have been helped by the treatment.

If the question of the civil commitment of sex offenders fades from view, the question of the government's power to incarcerate outside of the criminal process is becoming, if anything, more important. Our

92. But see Carol S. Steiker, *Punishment and Procedure: Punishment Theory and the Criminal-Civil Procedural Divide*, 85 GEO. L.J. 775, 817-19 (1997) ("[S]chemes to commit 'sexually violent predators' . . . speak much more clearly the language of prevention than that of blame.").

93. *Id.* at 361.

94. See, e.g., *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 165 (1963) (holding that statutes divesting persons of citizenship based on draft evasion are unconstitutional); *Joint Anti-Fascist Comm. v. McGrath*, 341 U.S. 123, 126 (1951) (denying the attorney general the power to designate organizations as communist); *United States v. Lovett*, 328 U.S. 303, 315 (1946) (holding that an Act prohibiting "subversives" from government work was an unconstitutional bill of attainder).

95. *Supra* note 1.

government has pledged to use all its power in its efforts to combat terrorism.⁹⁶ That power has already included detention without any criminal charges of thousands of individuals.⁹⁷ It is my great hope that our government will be judicious about the use of this power, and that we may thereby avoid repeating some of the mistakes of our past.

96. See, e.g., G. Robert Hillman & Richard Whittle, *Embattled CIA Gets Lift from Bush; More Nations Join U.S. Fight Against Terrorism*, DALLAS MORNING NEWS Sept. 27, 2001, at 12A (detailing efforts to enlist the support of other countries in the war against terrorism).

97. See, e.g., Susan Sachs, *Dispute That Prevented New Jersey Deportation is Resolved*, N.Y. TIMES, Apr. 27, 2002, at A11 (discussing the situation of immigrants following the September 11, 2001 terrorist attacks).