Essays

Some Reflections on the Constitutionality of Sex Offender Commitment Laws

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I. INTRODUCTION

Much of my scholarly work in recent years has focused on the constitutional issues arising from various state laws addressing recidivist sex offenders.1 My work has not been purely academic, however. I have also been actively involved in litigation over such laws.2

My experiences with these laws—both as a legal scholar and as a lawyer litigating their constitutionality before the Supreme Court of the United States—will be the basis for this brief Essay. I am joined in this endeavor by my colleague, friend, and legal opponent, Professor David Gottlieb. Professor Gottlieb and I have been on opposite sides of the major Kansas cases, and we have on several occasions made joint presentations on these issues.

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2. See supra note *. 1011
In particular, we were both involved in the most important constitutional decision relating to our state’s sex offender legislation, *Kansas v. Hendricks*, which upheld the Kansas Sexually Violent Predator Act against several constitutional challenges. We were both involved in the most recent decision, *Kansas v. Crane*. We also both assisted (on opposite sides, of course) the parties in *Kansas v. Myers*, which addressed the Kansas Sex Offender Registration Act (more popularly referred to as a "Megan’s Law"), but these essays will focus on the sex offender commitment statutes and leave any point-counterpoint on Megan’s Laws for another day.

For these Essays, we have agreed to address the following issues:

**A. First Principles**

1. What are the purposes of civil commitment for the mentally infirm?

2. What are the constitutional standards for civil commitment, and what constitutional provisions are relevant?

3. As a constitutional and policy matter, should or must civil commitment and criminal justice systems be mutually exclusive?

4. Does the Kansas Sexually Violent Predator Act unconstitutionally or undesirably blur the line between civil and criminal systems?

**B. Substantive Due Process Principles**

1. Should state or federal courts—as opposed to state legislative bodies—decide what level of mental infirmity is necessary to justify involuntary civil commitment? If so, what sources of law or information should guide the courts?

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5. 122 S. Ct. 867 (2002).
2. What nature and level of mental infirmity is necessary to justify involuntary civil commitment?

3. Is the availability and provision of effective “treatment” constitutionally relevant?

I begin with brief descriptions of Kansas v. Hendricks and Kansas v. Crane, the two Supreme Court decisions in which I was involved and the two cases that speak most directly to the subjects of this Essay.

II. Kansas v. Hendricks

The key case addressing the major constitutional issues raised by sex offender commitment laws is Kansas v. Hendricks, decided in 1997. In Hendricks, the State of Kansas sought and obtained the involuntary civil commitment of Leroy Hendricks, a recidivist pedophile who conceded that he could not control his urge to molest children. As Hendricks was about to be released from prison for his latest sentence for such offenses, Kansas evaluated him under its then new Sexually Violent Predator Act. The Act essentially provides for the involuntary civil commitment and long term care and treatment of those sex offenders who are found to be suffering from a “mental abnormality” or personality disorder that makes them likely to reoffend. In other words, the sex offender must suffer from some mental infirmity and pose a danger to society.

Hendricks challenged the Kansas law on several constitutional grounds, including that it was simply an extension of criminal punishment (and thus not really civil in nature at all), that the mental conditions that could trigger its application did not rise to the level of “mental illness” required by the Constitution, and that it violated equal protection principles by singling out sex offenders for this new civil commitment system.

The Kansas Supreme Court agreed with Hendricks on the substantive due process ground—that the law did not require a showing of “mental illness” and therefore was itself infirm—but did not resolve the

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10. Id. § 29a01.
11. Hendricks, 521 U.S. at 347.
criminal punishment and equal protection issues.\textsuperscript{12} Kansas sought and obtained review in the Supreme Court of the United States on the substantive due process issue.\textsuperscript{13} Hendricks cross-petitioned on the criminal punishment and equal protection issues, and the Supreme Court granted review of those issues as well.\textsuperscript{14}

Ultimately, the Supreme Court rejected the substantive due process and criminal punishment challenges, concluding that the Kansas law defined a level of mental infirmity within the realm of traditionally accepted definitions for civil commitment purposes, and that the law was civil in nature.\textsuperscript{15} The Court did not address the equal protection issue because Hendricks declined to brief that issue on the merits.

III. \textit{Kansas v. Crane}

Three years later, the Kansas Supreme Court again found a constitutional infirmity in the Kansas statute. This time, in \textit{In re Crane}, the Kansas court concluded that the state could not civilly commit a sex offender absent a showing that the offender “cannot control” his criminal sexual behavior.\textsuperscript{16} The offender in this case, Michael Crane, had a long history of sexual offenses, many of an exhibitionist nature, but some also violent and aggressive. At his commitment proceeding, the mental health experts would not testify that Crane had no control over his behavior. Instead, they acknowledged that it was more likely that he simply chose not to control his behavior.

The Kansas Supreme Court concluded that the Supreme Court’s decision in \textit{Hendricks}—the majority opinion of which referred several times to Hendricks’ admitted “inability to control” his pedophilic behavior—imposed a constitutional requirement that the state prove complete or total inability to control behavior.\textsuperscript{17} The idea, of course, is that someone who is able to control behavior but does not is simply criminal, not mentally infirm, and should be dealt with solely under the criminal system.

Kansas again successfully sought review of the Kansas Supreme Court’s decision in the Supreme Court of the United States.\textsuperscript{18} Kansas

\begin{footnotesize}
\begin{enumerate}
\item[12.] \textit{Id.} at 350.
\item[13.] \textit{Id.}
\item[14.] \textit{Id.}
\item[15.] \textit{Id.} at 346–48.
\item[16.] 269 Kan. 578, 586, 7 P.3d 285, 290 (2000).
\item[17.] \textit{Id.}
\item[18.] \textit{Crane}, 122 S. Ct. 867 (2002).
\end{enumerate}
\end{footnotesize}
presented the substantive due process question whether the State is constitutionally required to prove that a recidivist sex offender cannot control his criminal sexual behavior in order to commit such an offender. Kansas argued for no “volitional impairment” requirement at all, and Crane argued for a complete or total inability to control standard.\(^\text{19}\)

The Supreme Court essentially gave each side half the loaf, unanimously holding that the Kansas Supreme Court erred in concluding that the Constitution requires proof of a complete or total inability to control behavior.\(^\text{20}\) But the Court also held that the State must prove something in this regard, in particular “serious difficulty in controlling behavior,” though the Court pointedly failed to provide any real definition for this constitutional requirement.\(^\text{21}\)

IV. FIRST PRINCIPLES

A. The Purposes of Civil Commitment for the Mentally Infirm

An initial constitutional question raised and briefed in Kansas v. Hendricks is the proper purposes of civil commitment.\(^\text{22}\) Certainly, all parties agreed that treatment of the mentally ill and protecting the mentally ill from harm are traditional and legitimate purposes of state civil commitment laws.\(^\text{23}\) Beyond that, the disagreement begins.

Kansas argued in Hendricks—and the Supreme Court appears to have agreed—that civil detention may at times be permissible for reasons of public safety and that such a purpose is constitutionally valid, at least in some circumstances, in the civil commitment context.\(^\text{24}\) Incapacitation of those who pose a threat to society by reason of mental infirmities is part of the justification for civil commitment laws in general, not just sexual predator laws, and should be.\(^\text{25}\) Certainly, incapacitation should be a valid justification for sex offender commitment laws, and the most obvious and notorious example is the case of recidivist pedophiles such as Leroy Hendricks.

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19. Id. at 869.
20. Id. at 870.
21. Id.
23. Id. at 363.
24. Id. at 366.
25. See, e.g., United States v. Salerno, 481 U.S. 739, 749 (1987) (“We have also held that the government may detain mentally unstable individuals who present a danger to the public, and dangerous defendants who become incompetent to stand trial.”) (internal citations omitted).
The Supreme Court has frequently emphasized historical practice in determining substantive due process limits. Historical practice, however, does not tend to limit the circumstances and purposes for which a state might seek to commit an individual for mental infirmity. Although perceived lack of volitional control (the issue in *Crane*) has certainly been one basis for civil commitment, it has by no means been the only basis. Indeed, sources regarding eighteenth and nineteenth century practices and laws uniformly indicate that the States enjoyed wide latitude in determining the bases for civil commitment.

Moreover, well-established practices such as quarantine could not be justified on the ground that persons being quarantined for contagious diseases lack the ability to control their behavior. Nonetheless, involuntary quarantine for contagious diseases does not violate due process.

Kansas does not use its sexual predator law to warehouse those sex offenders due to be released from prison that the State still considers dangerous. In fact, Kansas has established a relatively elaborate treat-

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26. See, e.g., Leland v. Oregon, 343 U.S. 790, 798 (1952) (stating that "[t]he fact that a practice is followed by a large number of states is not conclusive in a decision as to whether that practice accords with due process, but it is plainly worth considering in determining whether the practice offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental"); Montana v. Engelhoff, 518 U.S. 37, 43 (stating that the Court's "primary guide in determining whether the principle in question is fundamental is, of course, historical practice").

27. See, e.g., WILLIAM BLACKSTONE, COMMENTS ON THE LAW OF ENGLAND 294 (1765) (stating that involuntary commitment was justified for "lunatics," "persons under frenzies," those "who lose their intellects by disease," and those "by any means rendered incapable of conducting their own affairs"); ALBERT DEUTSCH, THE MENTALLY ILL IN AMERICA 418–22 (1937) (discussing the variety of common law bases for involuntary commitment in the last quarter of the eighteenth century and first half of the nineteenth century); id. at 422 (discussing the case of Josiah Oakes in 1845 in which "Chief Justice Shaw ruled that restraint of the insane was justified not only by regard for public or personal safety, but by considerations of remedial treatment"); GERALD N. GROB, MENTAL INSTITUTIONS IN AMERICA: SOCIAL POLICY TO 1875 9 (1973) (listing a variety of bases for involuntary commitment in colonial times).

28. See, e.g., GROB, supra note 27, at 3, 132 (indicating that mental hospitals in the nineteenth century cared for a variety of individuals, including those "whose behavior was deemed socially disruptive by the community" or "abnormal," or who "because of behavioral problems [were] deemed dangerous to the security either of the family or of society"); see also supra note 27 (providing historical examples of the bases for civil commitment).

29. THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 584 (1868) (stating that "quarantine regulations and health laws" are an inherent part of the "police power of the States").

30. Compagnie Francaise de Navigation à Vapeur v. La. State Bd. of Health, 186 U.S. 380, 393 (1902) (permitting involuntary quarantine of persons suffering from communicable diseases); see O’Connor v. Donaldson, 422 U.S. 563, 582–83 (1975) (Burger, C.J., concurring) ("There can be little doubt that in the exercise of its police power a State may confine individuals solely to protect society from the dangers of significant antisocial acts or communicable disease"); Jacobson v. Massachusetts, 197 U.S. 11, 26, 29 (1905) (holding that mandatory vaccinations do not violate due process, and noting that quarantine does not either).
mment facility and program in Larned, Kansas, for those committed under the Kansas law.31 These offenders receive real and meaningful treatment, and at least one (Michael Crane) has publicly acknowledged the benefit and value of that treatment program.32 Kansas is providing legitimate, therapeutic treatment to those committed under the Kansas Act.

Nonetheless, the provision of treatment and the success of such treatment are not constitutional imperatives. If they were, then some well-accepted commitments under traditional laws would be constitutionally invalid. There have always been persons institutionalized with no hope of a “cure.” But that has never made their commitment invalid, so long as the constitutional requirements set forth in the next section are satisfied.

B. The Constitutional Standards for Civil Commitment of the Mentally Infirm

The Court’s precedents in the civil commitment context—including its decision in Kansas v. Hendricks—uniformly recognize only two substantive due process requirements. First, there must be proof that the person is dangerous to himself or others. Second, that dangerousness must be linked to a significant mental problem.33 In Hendricks, eight Justices agreed that the Kansas Sexually Violent Predator Act (and thus all of the subsequent state statutes modeled on the Kansas law) satisfies those two requirements.34 The division of opinion in Hendricks was over Hendricks’ criminal punishment challenge, not his substantive due process claims.

Indeed, in his concurring opinion in Hendricks, Justice Kennedy observed that “[a]s all Members of the Court seem to agree, then, the

31. Brief for Cross-Respondent at 23, Hendricks v. Kansas, 521 U.S. 346 (1997) (No. 95-9075); see Hendricks, 521 U.S. at 368 n.5 (noting that in a hearing on Hendricks’ petition for state habeas corpus relief, the trial court ruled that “[t]he allegation that no treatment is being provided to any of the petitioners or other persons committed to the program designated as a sexual predator treatment program is not true. I find that they are receiving treatment”).
32. See infra note 34.
33. Fouca v. Louisiana, 504 U.S. 71, 75–76 (1992) ("Addington v. Texas, 441 U.S. 418 (1979), held that to commit an individual to a mental institution in a civil proceeding, the State is required by the Due Process Clause to prove by clear and convincing evidence the two statutory preconditions to commitment: that the person sought to be committed is mentally ill and that he requires hospitalization for his own welfare and protection of others.").
34. Justice Ginsburg does not appear to have joined any opinion on the substantive due process issues. See Hendricks, 521 U.S. at 373 (noting that Justice Ginsburg only joins Parts II and III of the dissent).
power of the State to confine persons who, by reason of a mental disease or mental abnormality, constitute a real, continuing, and serious danger to society is well established.\textsuperscript{35} This statement is an accurate summary of the principles the Court has established and reiterated in a long line of mental health cases.\textsuperscript{36} Justice Breyer, who dissented on the criminal punishment question in \textit{Hendricks}, nonetheless also concluded that the Kansas Act satisfied substantive due process principles.\textsuperscript{37}

Part of the argument in \textit{Kansas v. Crane} was whether the Kansas Supreme Court’s decision regarding an offender’s “inability to control” his criminal sexual behavior was \textit{adding} to the two constitutional requirements, or simply \textit{amplifying} those requirements.\textsuperscript{38} The Supreme Court’s decision in \textit{Crane} appears to have taken the latter view, though the dissenters clearly viewed the lower court’s decision (as did Kansas) as \textit{adding} a new constitutional requirement.\textsuperscript{39}

\textbf{C. Civil Commitment and Criminal Justice}

Whether the criminal and civil systems may overlap—and if so, to what extent—is a fascinating and extraordinarily difficult constitutional question. This issue arose in \textit{Hendricks}, with Hendricks asserting that the two systems must be kept strictly separate.\textsuperscript{40} Thus, in his view, he either had to be punished under the criminal system or committed for treatment under the civil system, but the State lacked constitutional authority to do both or to structure some kind of combined system.

Kansas argued (successfully) that the two systems are not necessarily mutually exclusive.\textsuperscript{41} This is in fact a curious situation. If Hendricks were correct, then the States’ clear incentive would be to enact lengthy

\textsuperscript{35} 521 U.S. at 372 (Kennedy, J., concurring).
\textsuperscript{36} \textit{See}, e.g., Seling v. Young, 531 U.S. 250, 262 (2001) (acknowledging that the State has an interest in protecting the public from dangerous persons); \textit{Hendricks}, 521 U.S. at 366 (same); \textit{Foucha}, 504 U.S. at 80 (acknowledging that the State can confine mentally ill persons if it can show they are dangerous); \textit{Addington v. Texas}, 441 U.S. 418, 426 (1979) (holding that “the state . . . has authority under its police power to protect the community from the dangerous tendencies of some who are mentally ill”); \textit{Humphrey v. Cady}, 405 U.S. 504, 507 (1972) (citing the requirement under the Wisconsin Sex Crimes Act that an individual must be deemed dangerous before he can be confined).
\textsuperscript{37} \textit{See} \textit{Hendricks}, 521 U.S. at 373 (Breyer, J., dissenting) (“I agree with the majority that the Kansas Sexually Violent Predator Act’s ‘definition of mental abnormality’ satisfies the ‘substantive’ requirements of the Due Process Clause.”).
\textsuperscript{38} 122 S. Ct. 867, 871 (2002).
\textsuperscript{39} \textit{Id.} at 875–76 (Scalia, J., dissenting).
\textsuperscript{40} \textit{Hendricks}, 521 U.S. at 364.
\textsuperscript{41} \textit{Id.}
and harsh prison sentences for recidivist sex offenders and let them sit in prison for a long time, many for the rest of their lives. The States would have that incentive because there would not be the option of seeking the civil commitment of those leaving prison who may not yet be safe—by reason of mental infirmity—to release into society. In other words, if we can’t be sure, we should just lock up sex offenders for good.

Of course, the offenders would argue that the States should pursue exactly that strategy if society views sex offenses as so heinous, but that it is unconstitutional and fundamentally unfair to change the rules—after conviction and while offenders are in prison—to permit the indefinite (perhaps for life) involuntary commitment of those sex offenders for whom the State simply did not obtain a sufficiently long prison sentence in the first instance.\textsuperscript{42}

As a practical matter, it is not necessarily simple to determine whether a particular individual deserves punishment, needs mental health treatment, or both. The Kansas Supreme Court’s conclusion in \textit{Crane} that the State must prove that a mentally disturbed sex offender “cannot control” his criminal sexual behavior in order to commit him does not rest comfortably with scientific and medical fact.\textsuperscript{43} Virtually no one has complete and total lack of volitional control, even those who suffer from schizophrenia or serious psychoses.\textsuperscript{44} There often is no clear line between a “mad” and a “bad” sex offender. Indeed, many sex offenders fall somewhere between those two extremes.

One reason those opposed to sex offender civil commitment laws pushed for a “cannot control” standard in \textit{Crane} is that virtually all psychiatric diagnoses would fail to satisfy such a test, effectively eviscerating the laws. Volitional impairment is a feature of many mental problems and disorders, but even some of the most troubled people are rational and calculating at least some of the time, if not much of the time. Some of our country’s most heinous sex offenders—people such as Ted Bundy and Jeffrey Dahmer—certainly did not have complete “inability

\textsuperscript{42} See \textit{Brief for Respondent at 10, Kansas v. Hendricks, 521 U.S. 346 (1997)} (Nos. 95-1649 and 95-9075) (arguing that the State, “motivated by its politically driven desire to continue the punishment and incapacitation of persons like Mr. Hendricks, and regretting the level of punishment it had prescribed for their crimes before they were committed . . . constructed an elaborate ruse”).

\textsuperscript{43} \textit{Crane}, 269 Kan. at 586, 7 P.3d at 290.

\textsuperscript{44} See, \textit{e.g.}, \textit{Brief for Amicus Curiae Association for the Treatment of Sexual Abusers at 3, Kansas v. Crane, 122 S. Ct. 867 (2002)} (No. 00-957) [hereinafter “ATSA Brief”] (quoting Christopher Slobohin, \textit{An End to Insanity: Recasting the Role of Mental Disability in Criminal Cases}, 86 Va. L. Rev. 1199, 1238 (2000) (“[A]s Morse and others have shown, even the most severely crazy people usually intend their acts and therefore have some control of them.”)).
to control” their murderous behavior. Rather, they were quite cunning and calculating, and both of them managed to avoid detection and prosecution for years. But if held to a complete or total lack of control standard, it is likely that a state could not prove that even offenders such as those two could be subject to involuntary civil commitment for residential care and treatment. Perhaps the better policy choice would be to either lock up for life or execute the Dahmers and Bundys of this world. But it is not clear why the Constitution should compel the States to choose those options.

Moreover, the medical and scientific reality is that volitional control is a matter of degree that is impossible to measure or establish.\(^{45}\) That uncontroversible fact counsels in favor of constitutional standards that permit the States to exercise reasonable legislative judgment.

It seems very unlikely that any reputable mental health professional would be willing to testify that anyone—including someone like Dahmer or Bundy—has a “complete” or “total” lack of control over their criminal sexual behavior. In discrediting the “irresistible impulse” theory of “insanity” in the criminal context, the American Psychiatric Association long has taken the position that the “line between an irresistible impulse and an impulse not resisted” is indeterminate in practice and profoundly problematic in theory.\(^{46}\) Rather, those suffering from mental disorders generally have neither a “complete” nor “total” lack of control over their criminal behavior, though they may well lack some control. In other words, their disorders probably do affect their volitional and emotional capacity, but only to some greater or lesser degree which is impossible to measure.

Thus, asking or expecting state or federal courts to resolve such disputed and uncertain mental health issues (ostensibly as constitutional law) is unrealistic—perhaps even nonsensical—as a medical, scientific, and practical matter.

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45. See, e.g., ATSA Brief, supra note 43, at 3–11 (discussing the difficulty in determining the difference between impulse and irresistible impulse); Stephen J. Morse, Crazy Reasons, 10 J. CONTEMP. LEGAL ISSUES 189, 218 (1999) (stating that there is “no valid scientific or clinical test for whether an agent possesses sufficient capacity for rationality to be responsible”).

46. Brief for Amicus Curiae American Psychiatric Association at 25 n.22, Kansas v. Hendricks, 521 U.S. 372 (1997) (Nos. 95-1649, 95-9075) (quoting APA Statement on the Insanity Defense, 140 AM. J. PSYCHIATRY 681, 685 (1983)). Defining the concept of “insanity”—both for legal and medical purposes—has long bedeviled both lawyers and mental health professionals. See, e.g., DEUTSCH, supra note 26, at 386 (“Indiscriminately used in both a medical and a legal sense, the word insanity lacks scientific sanction or precise meaning in either.”) (emphasis in original).
D. The Kansas Sexually Violent Predator Act

Perhaps the most serious charge leveled at the Kansas Sexually Violent Predator Act\(^\text{47}\) is that it is nothing more than a poorly-disguised means of extending the prison sentences of dangerous sex offenders.\(^\text{48}\) Certainly, the Constitution recognizes the risk and dangers of ex post facto legislation that changes the rules or punishment for criminal conduct after the fact.\(^\text{49}\)

But on the other side of the coin in this context are the legitimate therapeutic reasons for at least permitting states the option of utilizing some combination of criminal punishment and civil care and treatment. The result of invalidating the Kansas law or imposing narrow, rigid (I hesitate to use the word straitjacket in this context) constitutional requirements on the implementation of the law will be that many dangerous sex offenders who could benefit from intensive, residential therapy—indeed many who might be among those most likely to benefit—and who pose a significant danger to the public, will simply have to be released from state custody without such treatment. Many such offenders refuse to participate in prison treatment programs for various reasons,\(^\text{50}\) and more are likely to refuse if there is no possibility that failure to engage in meaningful treatment in prison can lead to civil commitment upon completion of their sentences.

Moreover, the treatment modalities for sex offenders are often very different than for individuals committed under general civil commitment

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48. See Brief for Respondent at 19–20, Kansas v. Hendricks, 521 U.S. 346 (1997) (arguing that “Kansas has decided that, viewed in retrospect, the time prescribed in Mr. Hendricks’ sentence was inadequate. In response, the legislature has prospectively enacted substantially longer sentences for those individuals who commit such crimes in the future . . . [because] the Constitution’s prohibitions against ex post facto laws and double jeopardy prevented the state from openly extending Respondent’s sentence”).
49. U.S. Const. art. I, § 10; art. I, § 9, cl. 3.
50. Another case currently pending before the Court implicates the interaction of incentives to participate in sex offender treatment programs in prison and the civil commitment of violent sex offenders following completion of their sentences. In McKune v. Lile, 224 F.3d 1175 (10th Cir. 2000), cert. granted, 532 U.S. 1018 (2001), the Court is considering “whether the revocation of correctional institution privileges violates the Fifth Amendment’s privilege against self-incrimination where the inmate has no liberty interest in the lost privileges and such revocation is based upon the inmate’s failure to accept responsibility for his crimes as part of a sex offender treatment program.” Petitioner’s Brief at i, Lile v. McKune, 224 F.3d 1175 (10th Cir. 2000) (No. 00-1187). Obviously, sex offender inmates who have meaningful incentives to participate in prison treatment programs—whether those incentives are the potential loss of prison privileges or the possibility of civil commitment at the end of the inmates’ sentences—are much more likely to participate in such treatment in prison, a result that is in the best interests of both the offenders and the public.
statutes. Some acutely psychotic conditions are responsive to various antipsychotic drugs, but typical sex offender conditions such as pedophilia, exhibitionism, and Antisocial Personality Disorder usually are not treated with medication.\footnote{At this time, there is no consensus regarding drug therapy for violent, recidivist sex offenders. \textit{See}, e.g., J.M.W. Bradford, \textit{The Antianдрogen and Hormonal Treatment of Sex Offenders}, in \textit{HANDBOOK OF SEXUAL ASSAULT: ISSUES, THEORIES AND TREATMENT OF THE OFFENDER 297} (W.L. Marshall \textit{et al.} eds., 1990) (discussing antianдрogen and hormonal treatments as one means of treating sex offenders).} Recognized sex offender treatment techniques include behavioral reconditioning, relapse prevention, cognitive-behavioral strategies, enhancement of social skills, family systems approaches, and the addictive model.\footnote{\textit{Id.} at 279–382; Barbara K. Schwartz, \textit{Effective Treatment Techniques for Sex Offenders}, 22 \textit{PSYCHIATRIC ANNALS} 6, 315–19 (1992); ATSA Brief, \textit{supra} note 43, at 13–16.} These treatment strategies generally cannot be effective in only a short time frame, but they can be effective if properly pursued by sex offenders who have strong incentives to take such programs seriously.

V. SUBSTANTIVE DUE PROCESS PRINCIPLES

A. The State Legislatures’ Primary Role

Perhaps my strongest feelings about the sex offender commitment laws involve the federalism and separation of powers implications of substantive due process decisions. “So-called ‘substantive due process’ prevents the government from engaging in conduct that ‘shocks the conscience’ or interferes with rights ‘implicit in the concept of ordered liberty.’”\footnote{\textit{Salerno}, 481 U.S. at 746 (quoting \textit{Rochin v. California}, 342 U.S. 165, 172 (1952), and \textit{Palco v. Connecticut}, 302 U.S. 319, 325–26 (1937)).} Importantly, in its substantive due process analysis, the Supreme Court traditionally pays “particular deference to reasonable legislative judgments,”\footnote{\textit{Jones v. United States}, 463 U.S. 354, 365 n.13 (1983); \textit{see also} \textit{Marshall v. United States}, 414 U.S. 417, 427 (1974) (noting that courts should be cautious and avoid rewriting legislation).} especially when expert opinions differ on important medical or scientific issues, such as what constitutes “mental illness” or an identifiable mental disorder.\footnote{\textit{Hendricks}, 521 U.S. at 359.}

The Supreme Court traditionally has left the substantive aspects of state civil commitment statutes—as opposed to procedural requirements—to the States, with little federal constitutional limitation: “[T]his Court has never applied strict scrutiny to the substance of state laws involving involuntary confinement of the mentally ill.”\footnote{\textit{Foucha}, 504 U.S. at 119 (Thomas, J., dissenting) (emphasis added).} The due process
questions presented in both *Hendricks* and *Crane*, not surprisingly, were substantive in nature. The Kansas statute contains extensive procedural safeguards, including but not limited to the provision of counsel, the assistance of expert mental health professionals (at state expense, if necessary), the right to a jury trial, and a requirement that the State prove its case beyond a reasonable doubt. 57

In my view, *Hendricks* confirms that substantive due process notions only require that state legislatures choose between reasonable options supported by the legitimate judgments of mental health professionals when there is no consensus on particular medical or scientific questions. 58 The Court long has recognized that:

> The States have traditionally exercised broad power to commit persons found to be mentally ill. The substantive limitations on the exercise of this power and the procedures for invoking it vary drastically among the States. The particular fashion in which the power is exercised—for instance, through various forms of civil commitment, defective delinquency laws, sexual psychopath laws, commitment of persons acquitted by reason of insanity—reflects different combinations of distinct bases for commitment sought to be vindicated. 59

Particularly when a state legislature "undertakes to act in areas fraught with medical and scientific uncertainties, legislative options must be especially broad and courts should be cautious not to rewrite legislation . . . ." 60

In addressing the substantive due process requirement of dangerousness, the Court has rejected the argument that legislative choices necessarily must be justified by empirical, scientific or medical evidence, rather than ordinary reasonableness:

> We do not agree with the suggestion that . . . power to legislate in this area depends on the research conducted by the psychiatric community. . . . The lesson we have drawn is not that government may not act in the face of this

57. See Kan. Stat. Ann. §§ 59-29a05(c)(1) (providing the right to counsel), 59-29a06 (providing safeguards such as the right to counsel, mental health experts, and jury trial), 59-29a07(a) (requiring proof beyond a reasonable doubt for conviction).

58. The Court has recognized that psychiatry is not "an exact science, and psychiatrists disagree widely and frequently on what constitutes mental illness. . . ." Ake v. Oklahoma, 470 U.S. 68, 81 (1985).


uncertainty, but rather that courts should pay particular deference to reasonable legislative judgments.61

In both Hendricks and Crane it was clear that significant differences of expert medical opinion exist with regard to many aspects of the diagnosis and treatment of the mental conditions afflicting sex offenders. These differences of reputable medical opinion, however, should not constitutionally disable Kansas or the States from acting. Rather, the Supreme Court’s traditional deference to the States’ choices in dealing with mental health matters is absolutely proper and only logical as a constitutional matter. To me, this deference is perhaps the most important constitutional lesson of Hendricks, though the Court perhaps backslid a little in Crane.

The alternative is for the Supreme Court to impose a single civil commitment system on all of the States as a matter of federal constitutional law, something the Court has long declined to do, and with good reason. So long as there is a legitimate scientific and medical basis for the substantive requirements of a state’s civil commitment scheme, substantive due process requirements should be satisfied.

Nonetheless, some of Crane’s amici (most of whom made the same or very similar arguments as amici supporting Hendricks) contended that Hendricks only recognized deference to the States’ choices regarding what mental disorders or conditions amount to “mental illness” while

61. Jones, 463 U.S. at 365 n.13 (emphasis added). The “choice of a test of legal sanity involves not only scientific knowledge but questions of basic policy as to the extent to which that knowledge [of right and wrong] should determine criminal responsibility.” Leland, 343 U.S. at 801. In rejecting the argument that the Constitution requires States to recognize alcoholism as a defense to a criminal charge of public intoxication, the Supreme Court warned that:

We cannot cast aside the centuries-long evolution of the collection of interlocking and overlapping concepts which the common law has utilized to assess the moral accountability of an individual for his antisocial deeds. The doctrines of actus reus, mens rea, insanity, mistake, justification, and duress have historically provided the tools for a constantly shifting adjustment of the tension between the evolving aims of the criminal law and changing religious, moral, philosophical, and medical views of the nature of man. This process of adjustment has always been thought to be the province of the States.

Nothing could be less fruitful than for this Court to be impelled into defining some sort of insanity test in constitutional terms. . . . [F]ormulating a constitutional rule would reduce, if not eliminate, that fruitful experimentation, and freeze the developing productive dialogue between law and psychiatry into a rigid constitutional mold. It is simply not yet the time to write into the Constitution formulas cast in terms whose meaning, let alone relevance, is not yet clear either to doctors or to lawyers.

Powell v. Texas, 392 U.S. 514, 535–37 (1968) (Marshall, J.) (plurality opinion) (footnote omitted); see also Egelhoff, 518 U.S. at 50–51 (plurality opinion) (holding that due process does not compel a State to recognize a voluntary intoxication defense to a criminal charge).
apparently creating a rigid volitional impairment requirement.\textsuperscript{62} But the notion of volitional impairment is intertwined with the very concept of “mental illness.” The two concepts are not separate and distinct, and nothing in \textit{Hendricks} suggests that the Court was giving deference to the States with respect to only some unspecified portions of their efforts to define “mental illness” for legal purposes. With due acknowledgement to Yogi Berra, this was \textit{deja vu} all over again from \textit{Kansas v. Hendricks}, when the same amici struggled but failed to provide a single definition of “mental illness.”\textsuperscript{63}

In my view, the fundamental flaw in efforts to constitutionalize any definition of a concept like “mental illness” is that, scientifically and medically, we cannot agree on a single definition. Even if we did, it might well change over time. Moreover, the reasons that psychiatrists might favor or adopt a particular definition may differ from the concerns of state legislatures attempting to address dangerous persons with significant mental problems.

I would not contend that “anything goes” when it comes to defining “mental illness” for constitutional purposes, but I would in general resist efforts to have courts write a federal constitutional code of civil commitment.

\textbf{B. The Nature and Level of Mental Infirmity Necessary to Justify Commitment}

Largely for the reasons set forth in the preceding section, it is extraordinarily undesirable and difficult for the Supreme Court to create a constitutional definition of the nature and level of mental infirmity necessary to justify civil commitment. Any such effort will ultimately fail, except perhaps when the Court is presented with an extreme case in which a state has no medical or scientific basis whatsoever for a particular mental health enactment.

In several mental health cases prior to \textit{Hendricks}, the Supreme Court used a variety of terminology to describe the mental conditions at issue, including “mental disorder,” “mental disease,” “emotional disorder,”

\textsuperscript{62} Brief for Amicus Curiae American Psychiatric Association at 7, Kansas v. Crane, 122 S. Ct. 867 (2002) (N0. 00-957) (stating that in \textit{Hendricks}, the Supreme Court held that the Kansas “statute could not constitutionally be applied ‘absent a finding that a dependant suffers from a volitional impairment’”).

"emotionally disturbed," and "insane." 64 And the Court long has recognized that "psychiatrists disagree widely and frequently on what constitutes mental illness." 65 This is a point on which the Court could not have been more clear in Hendricks when it declared that:

[We] have never required state legislatures to adopt any particular nomenclature in drafting civil commitment statutes. Rather, we have traditionally left to legislators the task of defining terms of a medical nature that have legal significance. As a consequence, the States have, over the years, developed numerous specialized terms to define mental health concepts. Often, those definitions do not fit precisely with the definitions employed by the medical community. . . . Legal definitions, however . . . need not mirror those advanced by the medical profession. 66

Moreover, the Court reiterated in Hendricks that differences of opinion among mental health professionals "do not tie the State's hands in setting the bounds of its civil commitment laws. In fact, it is precisely where such disagreement exists that legislatures have been afforded the widest latitude in drafting such statutes." 67

The dissenting Justices in Hendricks also endorsed these fundamental principles. Discussing the significance of differences of medical opinion, Justice Breyer observed that:

[T]he very presence and vigor of this debate is important. The Constitution permits a State to follow one reasonable professional view, while rejecting another. The psychiatric debate, therefore, helps to inform the law by setting the bounds of what is reasonable, but it cannot here decide just how States must write their laws within those bounds. 68

As set forth in the preceding section, I read Hendricks as reaffirming the Court's reluctance to try to define "mental illness" for constitutional purposes. Crane likewise demonstrates the Court's discomfort with such a task; but, unlike Hendricks, the Crane decision does take a very

64. See Addington, 441 U.S. at 425–26 (employing the terms "emotionally disturbed" and "mentally ill"); Jackson, 406 U.S. at 732, 737 (using the terms "incompetency" and "insanity"); Andrew Hammel, The Importance of Being Insane: Sexual Predator Civil Commitment Laws and the Idea of Sex Crimes as Insane Acts, 32 HOUS. L. REV. 775, 799 (1995) ("[T]he Court has never attempted to articulate a clear due process standard for the permissible substantive content of statutory definitions of mental illness.").
65. Ake, 470 U.S. at 81.
66. 521 U.S. at 359 (internal citations omitted).
67. Id. at 360 n.3.
68. Id. at 375 (Breyer, J., dissenting) (internal citations omitted).
tentative stab at refining the “mental illness” definition. 69 Crane may also signal the Court’s discomfort with its acknowledged inability to provide such a definition, because having no constitutional limits on the definitions that states might adopt for civil commitment undoubtedly troubles the Court.

The difficulty here is the classic slippery slope. Once the Court wades into this area, there is no end to the difficult mental health questions with which it might have to wrestle. On the other hand, if the Court gives complete deference to the States, it probably perceives a risk that civil commitment might in some instances be invoked for improper purposes.

The other difficulty for the Court in this respect—and it is a substantial risk in my view—is that any constitutional rule it creates with respect to sex offender civil commitment must also apply to the States’ general and traditional civil commitment statutes. Thus, creating substantive due process rules regarding volitional impairment (or for that matter any other kind of impairment, such as cognitive or emotional) risks disrupting at least fifty state laws, not just the sex offender commitment statutes.

Indeed, the water is potentially even deeper here. If the Court starts to review rigorously the substance as opposed to the procedure of state civil commitment schemes, then why not do the same with respect to the substance of the States’ criminal laws? Surely, reasonable people can differ on whether certain conduct should be criminal and, if so, the appropriate level of punishment. The Court, of course, has historically tried to stay as far away as possible from second-guessing the States’ criminal laws. 70 But it would not have to, and in the criminal context there is theoretically even less reason to defer to state legislative judgments because the decision whether certain conduct should be a crime generally will not turn on the current state of scientific or medical knowledge. Rigorous federal judicial review could open a Pandora’s box of litigation.

C. Treatment and Constitutional Requirements

The Kansas law is not retributive or punitive simply because treatment may be more or less effective with some sex offenders than with

69. Crane, 122 S. Ct. at 871.
70. See, e.g., Egelhoff, 518 U.S. at 58 (Ginsburg, J., concurring) (“States enjoy wide latitude in defining the elements of criminal offenses . . . .”).
others. Nor is the law retributive or punitive because some offenders subject to it may have some or even considerable ability to control their criminal behavior. Indeed, if the effectiveness of treatment were the test, the case against the Kansas law would be even weaker. Crane himself acknowledged benefiting substantially from the treatment he received in the Kansas program, and admitted that such treatment in fact helped him learn to control his criminal sexual behavior.  

Rather, the important question is whether treatment is a legitimate goal of the Kansas law, which the Supreme Court in Hendricks found to be the case. Moreover, Kansas seeks the involuntary commitment of very few of the sex offenders who are being released from prison. For example, the examining state psychiatrist in Crane testified that, although Crane was approximately the tenth person whom the doctor had evaluated, Crane was the first person the doctor found to meet the statutory requirements. There is no evidence that Kansas is systematically using its law for deterrence, punishment, or to circumvent the criminal process.

Sometimes treatment is ineffective for the simple reason that the individual refuses to cooperate or participate in a meaningful fashion, as has been the case with many imprisoned sex offenders in Kansas. Moreover, “it remains a stubborn fact that there are many forms of mental illness which are not understood, some of which are untreatable in the sense that no effective therapy has yet been discovered for them, and that rates of ‘cure’ are generally low.” But these factors should not transform an otherwise legitimate treatment program into a criminal sentence or form of punishment. The State’s legitimate effort to treat the committed individual—not necessarily the State’s success in doing so—should be determinative for constitutional purposes.

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71. In an interview he apparently gave shortly after the Supreme Court granted certiorari in his case, Crane was quoted praising the Kansas treatment program and acknowledging that it had benefited him. See Tony Rizzo, Sexual-Predator Case Has National Implications, KANSAS CITY STAR, Apr. 10, 2001, at B1 (“I’m not hoping that this place [the treatment facility] gets shut down. I think the program is good.”); id. (“As much as I don’t want [this case] to be noteworthy, I want people to know that what I learned [in the treatment facility] is equally as noteworthy.”).

72. See Sellinger, 531 U.S. at 261.

73. 521 U.S. at 366.

74. O'Connor, 422 U.S. at 583 (Burger, C.J., concurring).
VI. CONCLUSION

In my role as a lawyer for the State of Kansas, I hope that I have been able to separate the question of whether sex offender commitment laws are constitutional from whether they are good policy. As to the former, I have been a zealous advocate for Kansas in defending our laws against constitutional challenge. As to the latter, I do not view it as my job to decide whether such laws are good or bad policy. And I do not think that the constitutionality of these laws rises or falls on a judicial determination as to whether they are the best policy choice available to our legislators.

But that may be where I differ from others, like my friend Professor Gottlieb. Fundamentally, I believe that the Constitution is something quite different from—and both more and less than—the policy preferences of the judges who interpret it. And I believe that this venerable document has created a remarkable governmental structure, one that recognizes and protects the notions of both federalism and the separation of powers. Thus, though it might seem odd to some, I view the litigation over the constitutionality of sex offender commitment laws more as argument about governmental structure and the role of our government institutions than as disputes over liberties expressly protected by the Bill of Rights.

I do not question that reasonable and intelligent people can disagree about these propositions, and indeed the Court itself is quite divided on these issues. As a scholar of constitutional law, I recognize that these disputes have been with us since the founding, and I suspect that they always will be with us. But that is not bad. A country that respects—while constantly questioning—its institutions of government may well have the best chance of long-term stability, prosperity, and survival.

So, I conclude with the perhaps not so novel suggestion that cases like *Kansas v. Hendricks* and *Kansas v. Crane* are as much about 200-year-old fundamental constitutional debates as they are about very modern efforts to deal with the problems presented by recidivist sex offenders.