

RECENT DEVELOPMENTS

HOW LITTLE CONTROL?: VOLITION AND THE CIVIL CONFINEMENT OF SEXUALLY VIOLENT PREDATORS IN

Kansas v. Crane, 122 S. Ct. 867 (2002)

Traditionally, civil confinement has been employed for the treatment and incarceration of non-responsible, non-culpable actors such as the severely mentally ill or the legally and criminally insane.¹ Due to concern about the danger repeat sexual offenders pose to public safety, many states, including Kansas, have passed statutes that permit civil confinement of sexually violent predators after completion of a criminal sentence.² In 1997, the Supreme Court upheld the Kansas civil confinement statute in *Kansas v. Hendricks*.³ The Court decided that a state could civilly confine a previously incarcerated sexually violent predator, due to the likelihood that the offender could engage in future criminal acts. *Hendricks*, however, left open the issue of whether civil confinement under that statute requires a finding that the defendant cannot control his dangerous behavior. Last term, in *Kansas v. Crane*,⁴ the Supreme Court held that *Hendricks* did not establish a requirement of a determination of *total* or *complete* lack of control, but that the Constitution would not permit commitment of a dangerous sexual offender without *any* lack-of-control determination.⁵ By trying to draw a fine line between the actual Kansas statute,⁶ which does not mandate a volitional control

1. See Stephen J. Morse, *Fear of Danger, Flight from Culpability*, 4 PSYCHOL. PUB. POL'Y & L. 250, 256 (1998).

2. Nearly twenty states have statutes similar to that of Kansas, which authorize civil commitment or other mandatory treatment for sexually dangerous individuals. See *Kansas v. Hendricks*, 521 U.S. 346, 397-98 app. (1997) (Breyer, J., dissenting).

3. 521 U.S. 346 (holding that definition of "mental abnormality" under the Kansas Sexually Violent Predator Act satisfied substantive due process requirements for civil commitment).

4. 122 S.Ct. 867 (2002).

5. *Id.* at 867-68.

6. KAN. STAT. ANN. § 59-29a01 (2001 Supp.):

The legislature finds that there exists an extremely dangerous group of sexually violent predators who have a mental abnormality or personality disorder and who are likely to engage in repeat acts of sexual violence if not treated for their mental abnormality or personality disorder. Because the existing civil commitment procedures under K.S.A. 59-2901 *et seq.* and amendments thereto

requirement, and the prior determination of the Kansas Supreme Court, which read *Hendricks* as requiring a *total* volitional impairment for civil confinement,⁷ the Court failed to provide a workable standard for the civil confinement of violent sexual predators. The holding of the Court is impermissibly vague and ultimately infringes upon both the precedent set by *Hendricks* and the right of a state legislature to establish its own standards on such matters.

On January 6th, 1993, Michael Crane engaged in two incidents that led to his arrest and imprisonment. First, he exposed himself to a tanning salon attendant.⁸ Thirty minutes later, at a video store, Crane, waiting until he was the only customer in the store, grabbed the clerk from behind with his genitals exposed, ordered her to perform a sexual act, and threatened to rape her, before running out.⁹ Crane was eventually convicted of lewd and lascivious behavior and pled guilty to aggravated sexual battery for these two incidents.¹⁰

The State filed a petition in the state district court seeking to have Crane evaluated and adjudicated as a sexually violent predator under the Kansas Sexually Violent Predator Act (SVPA).¹¹ Under the SVPA, the state can impose an involuntary civil confinement process for the long term care and treatment of sexually violent predators.¹² After psychological examination, the state district court committed Crane to custody under this Act.¹³ The court determined that Crane fulfilled the requirements of the SVPA, because he had a “mental abnormality or personality disorder” and was “likely to engage in

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

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

8. *State v. Crane*, 918 P.2d 1256, 1258 (Kan. 1996).

9. *Id.* at 1259.

10. *Id.* at 1258, 1274.

11. *Kansas v. Crane*, 122 S.Ct. 867, 872 (2002).

12. KAN. STAT. ANN. § 59-29a01 (2001 Supp.).

13. *In re Crane*, 7 P.3d. 285, 286 (Kan. 2000). Psychologist Douglas Hippe evaluated Crane in 1994 and reviewed the mental health records compiled for Crane. He concluded that Crane suffers from both antisocial personality disorder and exhibitionism and qualifies as a sexual predator. He also cited the increasing frequency of incidents involving Crane, his increasing disregard for the rights of others and his increasing daring and aggressiveness. *Id.* at 286-87.

repeat acts of sexual violence if not treated” for his disorder.¹⁴

The Kansas Supreme Court reversed and remanded the judgment of the district court.¹⁵ Judge Allegrucci, writing for the court, asserted that confinement under the SVPA is unconstitutional absent a finding that the defendant cannot control his dangerous behavior.¹⁶ The court interpreted the *Hendricks* decision as requiring a civil confinement statute to limit involuntary confinement to those “who suffer from a volitional impairment rendering them dangerous beyond their control.”¹⁷ Because Crane was diagnosed with a “personality disorder,” which by definition does not include a volitional impairment, his civil confinement was deemed to be unconstitutional.¹⁸

The Supreme Court granted certiorari and vacated and remanded the ruling of the Kansas Supreme Court. The Court held that *Hendricks* sets forth no requirement of *total* or *complete* lack of control, but that the Constitution does not permit confinement of the type of dangerous sexual offender considered in *Hendricks* without *any* lack-of-control determination.¹⁹ Writing for the Court, Justice Breyer first asserted that *Hendricks* does not require a complete lack of volition.²⁰ The Kansas Act, as referred to in *Hendricks*, requires a “mental abnormality” or “personality disorder” that makes it “*difficult*, if not impossible, for the [dangerous] person to control his dangerous behavior.”²¹ Justice Breyer emphasized that the word “difficult” indicates that the lack of control referred to by the Court in *Hendricks* is not absolute.²² He recognized that “most severely ill people—even those commonly termed ‘psychopaths’—retain some ability to control their behavior.”²³ Insistence upon absolute lack of control would risk barring the civil confinement of highly dangerous individuals who suffer from severe mental abnormalities.²⁴

Second, Justice Breyer stated that the Constitution does not permit confinement of the type of dangerous sexual offender considered in

14. KAN. STAT. ANN. § 59-29a01 (2001 Supp.); *In re Crane*, 7 P.3d. at 286.

15. *In re Crane*, 7 P.3d at 294.

16. *Id.* at 290.

17. *Id.* (quoting *Kansas v. Hendricks*, 521 U.S. 346, 358 (1997)).

18. *Id.* at 290.

19. *Kansas v. Crane*, 122 S.Ct. 867, 870-72 (2002).

20. *Id.* at 870.

21. *Id.* (emphasis in original).

22. *Id.*

23. *Id.*

24. *Id.*

Hendricks without any lack-of-control determination.²⁵ He asserted that *Hendricks* emphasizes the constitutional importance of “distinguishing a dangerous sexual offender subject to civil confinement ‘from other dangerous persons who are perhaps more properly dealt with exclusively through criminal proceedings.’”²⁶ According to Justice Breyer, this distinction is critical to prevent civil confinement from becoming a mechanism for general criminal deterrence or retribution.²⁷ Although recognizing the difficulties in precisely demonstrating “inability to control behavior,” Justice Breyer argued that there must be proof of serious difficulty in controlling behavior to create such a distinction.²⁸

Finally, Justice Breyer emphasized that the Court in *Hendricks* did not draw a clear distinction between “emotional” and “volitional” sexually-related mental abnormalities.²⁹ The Court in *Hendricks* had no occasion to decide whether confinement based on purely “emotional” abnormality would be constitutional, and likewise, the *Crane* court was unable to consider this issue.³⁰

Writing in dissent, Justice Scalia argued that the majority misinterpreted the precedent set by *Hendricks* and the very language of the SVPA.³¹ He asserted that *Hendricks* unequivocally states that “the SVPA’s required finding of a *causal connection* between the likelihood of repeat acts of sexual violence and the existence of a ‘mental abnormality’ or a ‘personality disorder’ *necessarily* establishes ‘difficulty if not impossibility’ in controlling behavior.”³² Therefore, according to Justice Scalia, no requirement of a separate

25. *Id.*

26. *Id.* (quoting *Kansas v. Hendricks*, 521 U.S. 346, 360 (1997)).

27. *Id.* (quoting *Hendricks*, 521 U.S. at 372-73 (Kennedy, J., concurring)).

28. *Id.* Justice Breyer realized the difficulties his reading of *Hendricks* and the Kansas Sexually Violent Predator Act created. He stated, “And we recognize that in cases where lack of control is at issue, ‘inability to control behavior’ will not be demonstrable with mathematical precision. . . . We recognize that *Hendricks* as so read provides a less precise constitutional standard than would those more definite rules for which the parties have argued.” *Id.* at 870-71.

29. *Id.* at 871.

30. *Id.* at 872.

31. *Id.* at 872-74 (Scalia, J., dissenting). Justice Scalia was joined in his dissent by Justice Thomas, who, notably, wrote the majority opinion in *Hendricks*.

32. *Id.* at 874. (emphasis in original). Justice Scalia continues by stating that this conclusion is “clearly confirmed by the very next sentence of the opinion, which reads as follows: ‘The precommitment requirement of a ‘mental abnormality’ or ‘personality disorder’ is consistent with the requirements of . . . other statutes that we have upheld in that it narrows the class of persons eligible for confinement to those who are unable to control their dangerousness.’” *Id.* (quoting *Kansas v. Hendricks*, 521 U.S. 346, 358 (1997)).

finding of inability to control behavior is necessary, as the majority indicated.³³

Justice Scalia also argued that the *Hendricks* opinion explicitly recognizes that the SVPA reaches individuals with not only volitional impairments but also those with other mental illnesses such as personality disorders and emotional and volitional impairments.³⁴ He refuted the majority argument that the narrowest holding of *Hendricks* covers only the application of the SVPA to the small number of sexual predators who are volitionally impaired, because the case involved a defendant with a volitional impairment.³⁵ Justice Scalia reiterated that *Hendricks* upheld the SVPA *in its entirety* as constitutional, covering volitional and emotional impairments.³⁶ Finally, Justice Scalia stated that the majority opinion provided little guidance for trial courts on how to proceed in establishing the vague standard that it had set.³⁷ Rather than vacating the judgment of the Kansas Supreme Court, Justice Scalia would have reversed to uphold the original determination made by the Kansas State District Court to allow civil confinement of Crane.³⁸

By misinterpreting the *Hendricks* decision, the Court failed to provide a workable standard for the civil confinement of sexual violent predators. The holding of the Court muddles the clear standard set by *Hendricks* and infringes upon the rights of states to legislate to protect their citizens. In mandating a vague volitional “standard” not present in the original statute, the Court also blurs the line between civil and criminal confinement, confuses lower courts, and ultimately hinders the prevention of violent sexual assaults by dangerous and predictable repeat offenders.

Justice Breyer based his conclusion that a volitional impairment is required above and beyond a finding of proof of dangerousness and mental abnormality for civil confinement on a misreading of the original *Hendricks* opinion. He relied on *Hendricks*' reference to the Kansas Act as requiring a “mental abnormality” or “personality disorder” that makes it “difficult, if not impossible, for the

33. *Id.* at 873.

34. *Id.* at 875.

35. *Id.*

36. *Id.*

37. *Id.* at 876. Justice Scalia asks, “How is one to frame for a jury the degree of ‘inability to control’ which. . . ‘the nature of the psychiatric diagnosis, and the severity of the mental abnormality’ require? Will it be a percentage?. . . Or a frequency ratio?. . . Or merely an adverb?” *Id.*

38. *Id.* at 872, 877.

[dangerous] person to control his dangerous behavior.”³⁹ Justice Breyer employed a somewhat mangled textualist approach by using this phrase to justify an additional lack-of-control determination in order to make the SVPA constitutional. He stated that the word “difficult” in this phrase indicates that the Court implicitly required *some* lack-of control determination.⁴⁰ Justice Breyer completely ignored the next sentence of the *Hendricks* opinion, which reads that “the precommitment requirement of a ‘mental abnormality’ or ‘personality disorder’ is consistent with the requirements of these other statutes that we have upheld in that it narrows the class of persons eligible for confinement to those who are unable to control their dangerousness.”⁴¹ A reading of these sentences in combination indicates that the *Hendricks* opinion stands for the proposition that a finding of “future dangerousness” along with the existence of a “mental abnormality” or “personality disorder” establishes the requisite “difficulty if not impossibility” in controlling behavior.⁴² Otherwise, considering that the jury verdict reinstated by *Hendricks* had no additional requirement of a lack-of-control determination, these sentences taken together would make little sense.⁴³ It seems clear that the majority in *Hendricks*, affirming the constitutionality of the SVPA, established that the finding of *both* “future dangerousness” and “mental abnormality” sufficiently narrows the class of individuals eligible for civil confinement, especially considering that the statutory text contained no volitional requirement.⁴⁴ Even vociferous critics of *Hendricks* (and civil confinement in general) realized what Justice Breyer did not: that *Hendricks* clearly does not mandate a volitional requirement for civil confinement under the SVPA.⁴⁵

39. *Id.* at 870 (quoting *Kansas v. Hendricks*, 521 U.S. 346, 358 (1997)).

40. *Id.* (“The word ‘difficult’ indicates that the lack of control to which this Court referred was not absolute.”). Additionally, Justice Breyer based his conclusions upon the importance of differentiating between civil commitment and criminal commitment. Breyer argued that this distinction is necessary “lest ‘civil commitment’ become a ‘mechanism for retribution or general deterrence.’” *Id.* (quoting *Hendricks*, 521 U.S. at 372-73 (Kennedy, J., concurring)). Unfortunately, as this note argues, Justice Breyer’s majority opinion may have the practical effect of collapsing this crucial distinction.

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

42. *See id.*; *see also* *Crane*, 122 S.Ct. at 874.

43. *See* *Crane*, 122 S.Ct. at 874.

44. It is unclear why Justice Thomas, the writer of the majority opinion in *Hendricks*, did not take the opportunity to clarify what he meant by the sentences in question by writing a dissent in *Crane*. Although Justice Scalia addresses many of these issues in his dissent, Justice Thomas’ silence is curious.

45. For instance, Professor Stephen J. Morse states that “*Hendricks*’ holding means that a state legislature is free within the widest limits to define mental abnormality as it wishes and to find that mentally abnormal people so defined are unable to control specific

By misinterpreting the precedent set by *Hendricks*, the Court overreached far beyond the scope of *Hendricks* and prior jurisprudence relating to civil confinement. Generally, the Court has affirmed civil confinement statutes when a finding of dangerousness is coupled with some additional factor, such as a “mental illness” or “mental abnormality.”⁴⁶ Essentially, civil confinement statutes are affirmed under such circumstances, because the Court prefers to defer to the determinations of state legislatures for medical terms, such as “mental illness,” that have legal significance.⁴⁷ One reason for this deference is that medical terms by nature are vague and transitory and state legislatures are better equipped than courts to respond to new medical or psychological findings or treatment options.⁴⁸ Additionally, state legislatures are responsible for addressing concerns regarding the public safety of their citizens and are best left relatively unimpeded in efforts to fulfill this responsibility. The Supreme Court has made it clear in the past that states may broadly and extensively exercise their police powers, including employing preventive detention of dangerous individuals, to protect the public from harm.⁴⁹

It is clear that the Kansas state legislature did not mandate a volitional requirement for civil confinement in the SVPA. The SVPA defines a “sexually violent predator” as “any person who has been convicted of or charged with a sexually violent offense and who

conduct.” Morse, *supra* note 1, at 264; see also Carol S. Steiker, *Foreword: The Limits of the Preventive State*, 88 J. CRIM. L. & CRIMINOLOGY 771, 785-88 (1998). Professor Steiker addresses the very phrases in question from *Hendricks* and concludes that these phrases did not specifically address or justify a volitional requirement. She states:

Given that the majority opinion [in *Hendricks*], unlike the dissent, endorsed not only *Hendricks*' incarceration, but the statutory language as well, future policy-makers and courts will remain at a loss to determine the degree of cognitive or volitional impairment necessary as a predicate to the indefinite incarceration of the dangerous. Indeed, policy-makers might even question whether any degree of cognitive or volitional impairment will be held by the Court to be a necessary predicate for the indefinite incarceration of the dangerous in the future. . .

Id. at 788.

46. See, e.g., *Seling v. Young*, 531 U.S. 250, 253 (2001); *Heller v. Doe by Doe*, 509 U.S. 312, 314-15 (1993); *Foucha v. Louisiana*, 504 U.S. 71, 86 (1992); *Addington v. Texas*, 441 U.S. 418, 425-26 (1979).

47. See *Hendricks*, 521 U.S. at 359; see also *Heller*, 509 U.S. at 321; *Addington*, 441 U.S. at 431. *Heller* and *Addington* are examples of how the Court has historically deferred to state legislation when civil commitment laws are involved.

48. See Michael Edmund O'Neill, *Stalking the Mark of Cain*, 25 HARV. J.L. & PUB. POL'Y 31, 59 (2001) (“Although scientific progress is commonly viewed as a steady, sure progression, such a view is far from reality. Scientific inquiry often proceeds in fits and starts, with many dead ends and stumbles While hardly orderly, the development of common-law norms tends to remain far more stable after time.”).

49. See Morse, *supra* note 1, at 259.

suffers from a mental abnormality or personality disorder which makes the person likely to engage in repeat acts of sexual violence.”⁵⁰ “Mental abnormality” is defined as a “condition affecting the emotional *or* volitional capability which predisposes the person to commit sexually violent offenses in a degree constituting such person a menace to the health and safety of others.”⁵¹ This definition has no requirement of inability to control behavior.⁵² Additionally, there is no express requirement of a finding of inability to control behavior in a “personality disorder” as defined by the statute.⁵³ By holding that a volitional test is required, even when the statute does not expressly mention such a test, the Court ignores its past jurisprudence, intrudes upon the rights of state legislatures to protect their citizens, and substitutes an exceedingly vague standard for one that was relatively straightforward.

Prior to *Crane*, a finding of dangerousness coupled with some “mental abnormality,” “personality disorder,” or “mental illness” would be adequate to trigger civil confinement in cases of sexually violent predators. After *Crane*, however, legislators and trial courts are essentially without guidance in determining how much volition would disqualify an offender from such confinement. The Supreme Court merely stated that although there is no requirement of total lack of control, there must be a lack-of-control determination of some kind.⁵⁴ Unfortunately, the Court refuses to elaborate beyond this vague holding, which abdicates its responsibility to provide guidance to lower courts.⁵⁵ The state courts and legislatures, mandated to follow a wholly unworkable and impermissibly vague volitional requirement for civil confinement of dangerous sexual predators, are left “holding the bag.” One can imagine legislators and trial judges alike, throwing up their hands and shrugging their shoulders in resignation, considering that they, like the Supreme Court, will be unable to formulate a coherent volitional test.

One reason that the Supreme Court, state legislatures, and lower courts will likely be unable to employ a workable volitional test for

50. KAN. STAT. ANN. § 59-29a02(a) (2001 Supp.).

51. KAN. STAT. ANN. § 59-29a02(b) (2001 Supp.) (emphasis added).

52. *See* *Kansas v. Crane*, 122 S.Ct. 867, 873-74 (2002) (Scalia, J., dissenting).

53. KAN. STAT. ANN. § 59-29a02(b) (2001 Supp.).

54. *Crane*, 122 S.Ct. at 870.

55. Justice Scalia states, “Unfortunately, [the majority opinion] gives trial courts, in future cases under the many commitment statutes similar to Kansas’s SVPA, not a clue as to how they are supposed to charge the jury! Indeed, it does not even provide a clue to the trial court, on remand, in this very case.” *Id.* at 876 (Scalia, J., dissenting).

civil confinement is that the question of how much volition warrants civil confinement is impossible to answer. Legal and psychiatric commentators generally agree that whether a person is able to control his impulses is almost impossible to know.⁵⁶ One legal commentator has stated: “There is, in short, no objective basis for distinguishing between offenders who were undeterrable and those who were merely undeterred. . . . Whatever the precise terms of the volitional test, the question is unanswerable—or can be answered only by ‘moral guesses.’”⁵⁷ Additionally, the volitional test for criminal insanity has proved to be impossible to implement and has been abandoned in criminal cases.⁵⁸ A coalition of state attorneys general has argued that implementation of a similar standard in the context of civil confinement laws would be similarly futile.⁵⁹

The fact that the volitional test the *Crane* decision requires is vague and ultimately unworkable could result in one of two specific unintended consequences—both of which are equally undesirable. The first of these consequences may be a blurring of the civil-criminal distinction. The fact that the volitional test for civil confinement is unworkable is unlikely to discourage the general public’s desire to contain dangerous sexual predators.⁶⁰ It is likely that criminal sanctions will merely be modified to extend incarceration of dangerous sexually violent predators, if civil confinement cannot be adequately utilized.⁶¹ Legislatures and courts may create a de facto

56. See Brief of the States of Illinois et al. at 10, *Kansas v. Crane*, 122 S.Ct. 867 (2002) (No. 00-957) [hereinafter Brief of the States].

57. *Id.* at 11 (quoting H.R. No. 98-1030, 98th Cong., 1st Sess. (1983), reprinted in 1984 U.S.C.C.A.N. 3182, 3408-09 (quoting Professor Richard Bonnie)).

58. See *id.* at 10; see also Stephen J. Morse, *Blame and Danger: An Essay on Preventative Detention*, 76 B.U. L. REV. 113, 130-32 (1996):

The apparently inexorable wave of [adopting control tests for insanity] halted abruptly in the wake of *Hinkley*, however, and many jurisdictions deleted the control test Even if a control test were available and interpreted broadly, however, for the same reason given concerning the rationality test, it is unlikely that many harmdoers would or should be acquitted by reason of insanity and civilly committed. In sum, broadening the traditional insanity defense will not excuse large numbers of defendants and make civil commitment more generally available.

Id.

59. Brief of the States, *supra* note 56, at 12.

60. “People who commit acts of sexual violence apparently scare us more than people who commit other violent offenses, and attempts to restrain the former are routine.” Morse, *supra* note 58, at 134.

61. See Paul H. Robinson, *Punishing Dangerousness: Cloaking Preventive Detention as Criminal Justice*, 114 HARV. L. REV. 1429, 1456 (2001) (“Less feasible, however, is political inaction in the face of recurring serious offenses that are preventable. The inevitable pressure for protection will express itself in one form or another.”).

preventative detention system utilizing initiatives such as “three strikes” laws that authorize life sentences for repeat offenders⁶² and lengthening prison sentences. Essentially, using the terms of Professor Paul H. Robinson, a “cloaked” system of preventative detention could develop,⁶³ which could replace the more open civil commitment regime.

This blurring of the line between criminal and civil confinement is problematic, because “the legitimacy of both the criminal and civil confinement systems depend on maintaining the distinction between them.”⁶⁴ One noted legal commentator asserts that “the moral legitimacy of the criminal law requires that offenders receive punishments that are directly proportionate to their culpability.”⁶⁵ If punishments are overly harsh and criminals are punished more than they deserve, then the legitimacy of criminal law will be undermined and may become ineffective.⁶⁶ When the criminal justice system is used to “cloak” what is really preventive detention, punishment is no longer proportionate to an offender’s culpability. When this occurs, the criminal law loses moral credibility among citizens, and the power of the criminal system to efficiently deter crime is reduced.⁶⁷ The “cloaking” that may occur due to the *Crane* decision, expanding criminal punishments due to an inability to effectively utilize civil confinement procedures, may lead to this unfortunate result. Moreover, this blurring of the civil-criminal distinction may reduce opportunities for dangerous sexually violent predators to receive

62. The Supreme Court will be considering the constitutionality of “three strikes” laws in *Lockyer v. Andrade*, No. 01-1127, and *Ewing v. California*, No. 01-6978. The oral argument was scheduled to be heard fall 2002 with a decision due by July 2003.

63. See Robinson, *supra* note 61, at 1456.

64. Morse, *supra* note 58, at 154. An excellent overview of the criminal-civil distinction was written by Professor Paul H. Robinson in a recent article. See Paul H. Robinson, *The Criminal-Civil Distinction and the Utility of Desert*, 76 B.U. L. REV. 201 (1996).

65. Morse, *supra* note 58, at 121 (referring to a response by Professor Paul H. Robinson).

66. See *id.*

67. See Robinson, *supra* note 64, at 212-213:

The criminal law can also be more directly effective in increasing compliance with its commands. If it earns a reputation as a reliable statement of what the community perceives as condemnable and not condemnable, people are more likely to defer to its commands as morally authoritative, at least in borderline cases where the propriety of certain conduct, or the degree of its impropriety is unsettled or ambiguous. The extent of the criminal law’s powers in both these respects—in facilitating and communicating consensus on what is and is not condemnable and in gaining compliance in borderline cases through deference to its moral authority—is directly proportional to the criminal law’s moral credibility.

Id.

appropriate treatment and eventually reenter society.⁶⁸

The other possible unintended consequence of *Crane* may be the simple decrease in the safety of citizens from violent sexual predators. If a volitional requirement is deemed unworkable, then civil confinement might become rarely utilized to protect the public and treat the offender. If somehow a volitional test is developed and implemented, there still will be a number of dangerous sexual offenders, unfit for society, who will escape civil confinement due to the fact that they can exercise *some* volition.⁶⁹ Justice Scalia provides the example of “the man who has a will of steel, but who delusionally believes that every woman he meets is inviting crude sexual advances.”⁷⁰ Such a sexually violent predator essentially will be free to commit at least one more sexual assault before being returned to criminal confinement.

The Supreme Court almost solely relies on *Hendricks* to reach its holding that the Constitution demands *some* volitional test for a statute like the SVPA to satisfy constitutional due process requirements. By misinterpreting this recent precedent and overreaching beyond its authority, the Court failed to provide the reaffirmation of *Hendricks* that Kansas sought. Instead, the Court threw the state of civil commitment laws into flux. Over 20 other states have civil commitment statutes similar to that of Kansas,⁷¹ and post-*Crane*, now have little idea how to proceed in detaining certain sexually violent predators. Lastly, the Court itself is not immune from suffering aftershocks from this muddled decision. By essentially reversing a decision made only five years prior, the court disturbs its own jurisprudence on the subject of civil confinement, which degrades its authority.⁷² As Justice Scalia states in his dissent, “There is an obvious lesson for state supreme courts that do not agree with our jurisprudence: ignoring it is worth a try.”⁷³

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68. Modern treatments exist for sexual offenders in civil commitment settings that are not available in criminal confinement. Treatment programs in civil commitment facilities may significantly reduce recidivism. See Brief for the Association for the Treatment of Sexual Abusers at 7-10, *Kansas v. Crane*, 122 S.Ct. 867 (2002) (No. 00-957).

69. See *Kansas v. Crane*, 122 S.Ct. 867, 875 (2002) (Scalia, J., dissenting).

70. *Id.*

71. See Steiker, *supra* note 45, at 781.

72. See *Crane* 122 S.Ct., at 876 (Scalia, J., dissenting). “Not only is the new law the Court announces today wrong, but the Court’s manner of promulgating it—snatching it back from the State of Kansas a victory so recently awarded—cheapens the currency of our judgments.” *Id.* at 872.

73. *Id.* at 876.

