

RATIONAL ENOUGH TO PUNISH, BUT TOO IRRATIONAL TO RELEASE: THE INTEGRITY OF SEX OFFENDER CIVIL COMMITMENT

*Jason A. Cantone**

TABLE OF CONTENTS

I.	Introduction	694
II.	The History and Hysterics Surrounding Civil Commitment.....	696
	A. The Early History of Sex Offender Civil Commitment	696
	B. Sexually Violent Predator Statutes.....	698
	C. The U.S. Supreme Court Gets Involved	701
III.	“Civil” Commitment.....	703
	A. Defining the Mental Illness Requirement	706
	B. Recidivism and Risk Assessment.....	708
	C. Treatment	714
IV.	A Guide to Better Research and Proposed Solutions	717
	A. Social Psychology Research.....	717
	B. Economic Research	718
	C. Clinical and Forensic Research	718
	D. Proposed Solution 1: Extended Criminal Sentence.....	720
	E. Proposed Solution 2: Lessons from Iowa’s System and Germany’s Old System.....	722
	F. Proposed Solution 3: Jury Instruction	725
	G. Proposed Solution 4: Returning to the True Intent of Civil Commitment.....	726
V.	Conclusion	727

* B.S., University of Illinois at Urbana-Champaign, 2004; M.A., University of Nebraska, 2008; J.D., University of Nebraska College of Law, 2008. I would like to thank Robert Schopp whose teachings and insight provided invaluable advice in the writing of this Article and in the exploration of the intersection between law and psychology. I would also like to thank Brian Sabata, Amy Ostdiek, and Sias Scherger for their edits of a previous draft. I especially thank my family and friends for their continued love and support in all things.

I. INTRODUCTION

“You know you want it.”¹ That is what Michael Crane said to a salon attendant after dropping his pants and beginning to masturbate in front of her.² When the attendant began to take action, Crane walked out the door peacefully.³ Less than an hour later, he dropped his pants at a video store.⁴ He then picked up the store clerk and carried her across the store, demanding that she perform oral sex.⁵ When he grabbed her neck and tried to force her to perform a sex act, the clerk shoved her knee into his groin.⁶ Crane then ran away.⁷

A jury found Crane guilty of four criminal charges and sentenced him to thirty-five years to life in prison.⁸ However, the Kansas Supreme Court reversed all of the convictions except for lewd and lascivious behavior.⁹ Addressing the attempted sodomy and attempted rape charges, the court found that a “fatally defective” complaint denied Crane his due process rights.¹⁰ The kidnapping conviction was reversed because there was insufficient evidence.¹¹ Fearing that the last charge could be dropped in a retrial, the prosecutor accepted a plea for aggravated sexual battery, and Crane was sentenced to time served.¹²

With Crane’s victims outraged and the community fearing the release of another sex offender who would prey on its children, the prosecutor sought to declare Crane a sexually violent predator (SVP) under the Kansas Sexually Violent Predator Act (KSVPA), which allowed indefinite civil commitment.¹³ To civilly commit Crane, the State needed to prove:

1. State v. Crane, 918 P.2d 1256, 1258 (Kan. 1996).
2. *Id.*
3. *Id.*
4. *Id.* at 1259.
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.* at 1258.
9. *Id.* at 1274.
10. See *id.* at 1266–69 (discussing the inadequacy of the State’s complaint).
11. *Id.* at 1273.
12. See *In re Crane*, 7 P.3d 285, 286–87 (Kan. 2000).
13. See Peter C. Pfaffenroth, *The Need for Coherence: States’ Civil Commitment of Sex Offenders in the Wake of Kansas v. Crane*, 55 STAN. L. REV. 2229, 2242–43 (2003) (“Crane’s victims and his prosecutor were disappointed that he would serve only a fraction of his original sentence. So, after being chastised by the state supreme court, the prosecutor tried another tactic: civil commitment.”).

(1) that Crane was convicted of a sex crime and (2) that he suffered from a mental condition that makes him likely to engage in future sexual predatory acts.¹⁴ Crane's guilty plea to the lesser charge of aggravated sexual battery guaranteed the first element would be met. To prove the second element, the State relied upon a psychiatrist from Crane's original trial who found Crane to be a sexual deviant and exhibitionist who enjoyed fearful responses from victims.¹⁵ This established the necessary elements for a commitment, and the jury unanimously committed Crane after ninety minutes of deliberation.¹⁶

With strong public opinions against sexual offenders re-entering the community, courts consistently err on the side of permitting indefinite civil commitments based upon incomplete definitions of the impairment necessary for such a commitment. This can lead to ethical dilemmas. In New York, for example, a state legislator who supported civil commitment legislation stated, "If they can't be treated and they are dangerous, you have got to come to grips with the fact that they should be put away."¹⁷

However, using civil commitment as preventative detention may undermine the integrity of the system. In January 2009, the United States Circuit Court of Appeals for the Fourth Circuit broke this tradition in *United States v. Comstock*, finding that "[t]he Constitution does not empower the federal government to confine a person solely because of asserted 'sexual dangerousness' when the Government need not allege (let alone prove) that this 'dangerousness' violates any federal law."¹⁸

This Article examines the civil commitment system and seeks to determine whether the process undermines the ethical integrity of the justice system's response to sexual offenders. Part II provides an overview of the history of civil commitment and clarifies the distinction between civil and criminal punishments and the level of impairment necessary to justify a commitment. Part III explores the rationale behind civil commitment statutes and examines whether effective treatments exist to reduce recidivism rates. Part IV focuses on how future research should be conducted and offers four proposed solutions to remedy the current flaws

14. *In re Crane*, 7 P.3d at 288.

15. *See id.* at 287, 289–90.

16. Pfaffenroth, *supra* note 13, at 2232.

17. Jennifer Medina, *As Albany Weighs Confinement of Sex Offenders, Some Fear a Threat to Civil Liberties*, N.Y. TIMES, Feb. 6, 2006, at B4 (quoting Dale M. Volker).

18. *United States v. Comstock*, 551 F.3d 274, 276 (4th Cir. 2009).

of the sexual offender civil commitment system. Part V concludes this Article.

II. THE HISTORY AND HYSTERICS SURROUNDING CIVIL COMMITMENT

News reports and films often depict sex offenders who recidivate shortly after their release back into the community.¹⁹ This has partially fueled a public demand for postponed release of sex offenders, whether through a longer criminal sentence or using civil commitment as preventative detention.²⁰ Theorists note that although some view civil commitment as a little known state law, the seventy-year history of sex offender treatment is a case of “*deja vu all over again*” that warrants exploration.²¹

A. *The Early History of Sex Offender Civil Commitment*

As early as 1911, state legislation defined sex offenders as “defective delinquents” and “criminal psychopaths.”²² This started a trend in which sex offenders were not treated as typical criminals, but as people with mental disorders warranting treatment.²³ Still, until the late 1930s, sex offenders generally received no special treatment and were considered no different from other criminal offenders.²⁴ Legal treatment of sex offenders closely followed the criminal system’s goals of incarceration and deterrence to right the wrong committed.²⁵ The rehabilitation movement officially began in the Midwest in the 1930s,²⁶ and in 1937, Michigan became the first

19. In 2006, for example, four award-winning films—*Little Children*, *Notes on a Scandal*, *The History Boys*, and *Deliver Us from Evil*—focused upon sexual offenses between adults and children.

20. Cf. Beth Miller, *A Review of Sex Offender Legislation*, KAN. J.L. & PUB. POL’Y, Spring 1998, at 40, 40 (“In recent years, public demand for protection from released sex offenders has been fueled by media stories of molestation and rape committed by those offenders.”). There have also been calls for chemical and surgical castration of sex offenders, but that is beyond the scope of this Article.

21. Samuel Jan Brakel & James L. Cavanaugh, Jr., *Of Psychopaths and Pendulums: Legal and Psychiatric Treatment of Sex Offenders in the United States*, 30 N.M. L. REV. 69, 70 (2000) (internal quotations omitted).

22. *Id.* at 70 n.9.

23. *Id.* at 70–71 (stating that the statutes began to distinguish “sexually deviant behavior from criminal behavior derived from other characterological or biological deficits”).

24. *Id.* at 70.

25. *See id.* at 70–71.

26. *See, e.g.*, Minn. ex. rel. Pearson v. Prob. Ct. of Ramsey County, 309 U.S.

state to adopt involuntary civil commitment procedures for sex offenders.²⁷ This legislation followed a new idea spawned from medical explanations for criminal behavior that indicated sex offenders should be treated rather than solely punished.²⁸ Rehabilitation leaders diverted sex offenders to treatment settings instead of prisons, aiming to provide a cure.²⁹ Offenders were given no indication of sentence duration because the goal was to release the offender only after recovery.³⁰ By the 1960s, more than half the states, following Michigan's lead, passed similar legislation.³¹ California, for example, civilly committed at least 700 sex offenders in the 1960s.³² Wisconsin restricted its use of civil commitment to prevent the state's Sex Crimes Facility from exceeding capacity.³³

This optimism toward treatment began to wane in the 1970s.³⁴ Empirical evidence soon revealed that sex offenders did not respond to treatment as well as expected.³⁵ The public began to demand that if rehabilitation could not occur, sex offenders should instead face extended criminal punishments.³⁶ As the general public became less optimistic about the efficacy of rehabilitation, the number of states with sexual psychopath

270, 276–277 (1940) (finding a rational basis for the claim that the term “psychopathic personality” was too vague when the Minnesota Supreme Court constructed a more focused definition in its ruling).

27. E.g., Marc W. Pearce, *Civilly Committing Criminals: An Analysis of the Expressive Function of Nebraska's “Dangerous Sex Offender” Commitment Procedure*, 85 NEB. L. REV. 575, 579 (2007) (citation omitted).

28. See THE MENTALLY DISABLED AND THE LAW 341 (Samuel J. Brakel & Ronald S. Rock eds., rev. ed. 1971) [hereinafter THE MENTALLY DISABLED].

29. Pearce, *supra* note 27.

30. THE MENTALLY DISABLED, *supra* note 28, at 346.

31. See Aman Ahluwalia, *Civil Commitment of Sexually Violent Predators: The Search for a Limiting Principle*, 4 CARDZOZ PUB. L. POL'Y & ETHICS J. 489, 489 (2006) (citation omitted).

32. THE MENTALLY DISABLED, *supra* note 28, at 348 n.59.

33. *Id.*

34. See Ahluwalia, *supra* note 31.

35. See Raquel Blacher, *Historical Perspective of the “Sex Psychopath” Statute: From the Revolutionary Era to the Present Federal Crime Bill*, 46 MERCER L. REV. 889, 906 (1995) (stating that various factors led to the treatment's decline, including “the recognition that not all violent sexual offenders were likely to respond to the same type of therapy[,] the growing awareness that sex offenders were not mentally ill[,] [and] the lack of proven treatment methods to reduce recidivism rates . . .”).

36. See, e.g., *id.* at 908–09 (stating that after a violent sexual attack on a young boy, in which the perpetrator was unable to be committed, the public mounted a campaign lobbying for tougher penalties for sex offenders).

laws also decreased.³⁷ By 1985, Nebraska was one of only five states that still applied their law “with any appreciable frequency.”³⁸

The United States Supreme Court addressed this shift back to a criminal model in *Specht v. Patterson*.³⁹ The Court transformed the civil commitment procedure into something inherently criminal: a full judicial hearing, assistance of counsel, the right to confront and cross-examine adverse witnesses, the right to present one’s own witnesses and evidence, and a final decision sufficiently articulated to permit meaningful review on appeal.⁴⁰ Overall,

U.S. jurisprudence regarding sex offenders was close to where it was before the whole sexual psychopath law experiment began: back to undifferentiated, criminal treatment, rejection of special rehabilitative goals or methods for sex offenders, and incarceration of sex offenders in prisons, sometimes under habitual criminal statutes permitting extra-long sentences.⁴¹

However, in 1990, Washington established a new procedure to deal with sex offenders: the sexually violent predator commitment procedure.⁴²

B. Sexually Violent Predator Statutes

Following the choking, rape, and mutilation of a seven-year-old child left for dead, the Washington legislature found that civil commitment statutes required a “mental disease or defect” and “recent overt acts”—a standard that the boy’s killer would not meet.⁴³ Subsequently, the state unanimously passed the Community Protection Act of 1990 (CPA).⁴⁴ The CPA first requires a petition, supported by sufficient facts, alleging that the person is a sexually violent predator as defined by statute.⁴⁵ The CPA

37. See, e.g., SAMUEL JAN BRAKEL ET AL., THE MENTALLY DISABLED AND THE LAW 740 (3d ed. 1985) (statistics concerning repealed psychopath laws).

38. Brakel & Cavanaugh, *supra* note 21, at 73 (other states included Massachusetts, New Jersey, Oregon, and Washington).

39. *Specht v. Patterson*, 386 U.S. 605 (1967).

40. See *Specht*, 386 U.S. at 609–10.

41. Brakel & Cavanaugh, *supra* note 21, at 74.

42. Pearce, *supra* note 27, at 579.

43. *Id.* at 580–81 (citing WASH. REV. CODE ANN. §§ 71.09.010, 71.09.020(6) (West 2002) (current version at WASH. REV. CODE ANN. §§ 71.09.010, 71.09.020(10) (West 2002 & Supp. 2008))).

44. See *id.* at 581.

45. See *id.* at 583. “Sexually violent predators” are defined as persons who have been ‘convicted of or charged with a crime of sexual violence and who suffer[]

allows any of the following factors as justification: (1) a past sexually violent offense (as an adult or juvenile) in which the person will soon be released from confinement; (2) a not guilty by reason of insanity *or* an “incompetent to stand trial” finding regarding a sexually violent offense; or (3) a “recent overt act” following release from confinement for a sexually violent offense.⁴⁶ If a twelve-person jury unanimously finds that the sex offender meets this standard beyond a reasonable doubt,⁴⁷ then the offender can be committed for custodial treatment until the condition “has so changed that the person no longer meets the definition of a sexually violent predator[] or until it is appropriate to release the person conditionally to a less restrictive environment.”⁴⁸ Despite this seemingly criminal procedure, the sexual predator is civilly committed.⁴⁹

Three years after the CPA went into effect, two men who were civilly committed after serving prison terms for rape challenged the CPA.⁵⁰ The Supreme Court of the State of Washington explored whether the statute was inherently criminal or civil because only a criminal matter would permit the *ex post facto* or double jeopardy claims to proceed.⁵¹ Using the two-prong test created in *United States v. Ward*, the court first analyzed whether the statute and its legislative history indicated a civil or criminal preference.⁵² As to the first prong, looking to the title of the act and the legislature’s own statement that the law was a civil law, the court found the statute to be civil in nature.⁵³ For the second prong, the court considered whether the procedure: (1) was historically considered punishment or

from a mental abnormality or personality disorder which makes [them] likely to engage in predatory acts of sexual violence if not confined in a secure facility.” *Id.* at 582 (citing WASH. REV. CODE ANN. § 71.09.020(16) (West Supp. 2005)).

46. *Id.* at 583.

47. *Id.* at 583–84 (“The person, the government, or the court may demand that the trial be held before a twelve-person jury and . . . its verdict [that the person is a sexually violent predator beyond a reasonable doubt] must be unanimous.”) (citing WASH. REV. CODE ANN. § 71.09.053(3) (West Supp. 2005)).

48. *Id.* at 584 (citing WASH. REV. CODE ANN. § 71.09.060(1) (West Supp. 2005)) (internal quotations omitted).

49. *See, e.g., id.*

50. *In re Young*, 857 P.2d 989, 994–95 (Wash. 1993).

51. *Id.* at 992.

52. *Id.* at 996 (citing *United States v. Ward*, 448 U.S. 242, 248–49 (1980)). The two-prong test involves, first, determining whether Congress “indicated either expressly or impliedly a preference for one label or another,” and, second, when Congress has intended to establish a civil penalty, “whether the statutory scheme was so punitive in purpose or effect as to negate that intention.” *Id.* (citation omitted).

53. *Id.*

would promote punishment purposes; (2) involved affirmative disability or restraint; (3) applied to already criminal behavior; (4) could be connected to an alternative purpose; and (4) was excessive compared to the rational alternative purpose.⁵⁴ The court held the CPA civil in nature, resulting in an automatic denial of the *ex post facto* and double jeopardy claims.⁵⁵ Courts often defer to the legislature's stated intent unless there is clear proof stating otherwise.⁵⁶

The court then analyzed the petitioners' substantive due process claims. In response to the challenge that the CPA allows commitment without proving mental illness and dangerousness, the court found that a rapist can be diagnosed with "paraphilia not otherwise specified"⁵⁷ and that this particular defendant also suffered from antisocial personality disorder.⁵⁸ This very low threshold is troublesome for two reasons. First, every rapist could be diagnosed with this paraphilia. Second, as many as 60% of those in prisons suffer from antisocial personality disorder.⁵⁹ The court also implicitly stated the recent overt act requirement to establish dangerousness was "absurd"⁶⁰ and that proving a treatment program's ability to rehabilitate is unnecessary for the civil commitment to bear a reasonable relation to the purpose.⁶¹ This low standard dramatically expanded the number of people eligible for civil commitment, and allowed the courts to commit people who would not have previously met the mental illness and dangerousness standards.

However, the United States District Court for the Western District of

54. *Id.* at 997–98 (citing *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168–69 (1963)).

55. *Id.* at 999–1000.

56. See *Flemming v. Nestor*, 363 U.S. 603, 617 (1960) (stating that "only the clearest proof" is sufficient to overcome the legislature's stated intent and noting that "[j]udicial inquiries into Congressional motives are at best a hazardous matter[] and is "a dubious affair indeed").

57. *In re Young*, 857 P.2d at 1002 (citation omitted).

58. *Id.*

59. P. Moran, *The Epidemiology of Antisocial Personality Disorder*, 34 SOC. PSYCHIATRY & PSYCHIATRIC EPIDEMIOLOGY 231, 234 (1999) ("[S]tudies show that antisocial personality disorder is extremely common in prisons with prevalence rates as high as 40–60% among the male sentenced population.").

60. *In re Young*, 857 P.2d at 1008 ("For incarcerated individuals, a requirement of a recent overt act under the Statute would create a standard which would be impossible to meet.").

61. *Id.* at 1004–05.

Washington stated that the CPA is criminal in nature.⁶² The court found that the CPA sought affirmative restraint, applied only to past criminal behavior, and promoted retribution and deterrence—all hallmarks of criminal punishment.⁶³ When courts impose affirmative restraint, there must be clear and convincing evidence that the defendant suffers from mental illness and is dangerous; the CPA did not meet these requirements.⁶⁴ The court found that the terms “mental abnormality” and “personality disorder” allowed the state to civilly commit people who do not have a mental disease or defect simply because they committed a prior sex crime.⁶⁵ The court also found that the legislature intentionally chose the terms to expand the number of people viewed as mentally ill and eligible for involuntary civil commitment.⁶⁶ This created a tension between state and federal courts, which the Supreme Court sought to remedy in its decision regarding the constitutionality of the Kansas Sexually Violent Predator Act (KSVPA).⁶⁷

C. The U.S. Supreme Court Gets Involved

In 1994, Kansas sought to commit Leroy Hendricks as a sexually violent predator after a 40-year history of sexual exploits with children.⁶⁸ Hendricks was nearing the end of a 10-year sentence, and Kansas used the KSVPA to commit Hendricks civilly.⁶⁹ Hendricks appealed, and the Kansas Supreme Court held that the KSVPA was criminal in nature and that its definition of mental abnormality did not meet the mental illness requirement for civil commitment.⁷⁰

62. *Young v. Weston*, 898 F. Supp. 744, 752–53 (W.D. Wash. 1995).

63. *Id.*; Pearce, *supra* note 27, at 590–91.

64. *See Young*, 898 F. Supp. at 749.

65. *See id.* at 750 (noting the CPA’s statutory definition of *mental abnormality* as “a congenital or acquired condition affecting the emotional or volitional capacity which predisposes the person to the commission of criminal sexual acts in a degree constituting such person a menace to the health and safety of others”).

66. *See id.* at 750 n.2 (“The legislature’s decision to employ a term unrecognized in the psychiatric community, coupled with its provision of a definition of no value to treatment professionals is an indication that the State did not intend the Statute to capture only the seriously mentally ill.”); *see also* Pearce, *supra* note 27, at 592.

67. Kansas Sexually Violent Predator Act, 1994 Kan. Sess. Laws ch. 316 (codified at KAN. STAT. ANN. § 59-29a01 to -29a22 (2008)).

68. *See Kansas v. Hendricks*, 521 U.S. 346, 353–56 (1997).

69. *See id.*

70. *Id.* at 356, 365 (citations omitted).

The United States Supreme Court disagreed, finding the “mental abnormality” definition met the requirements of substantive due process because it limits the category of people able to be committed to those individuals unable to control their dangerous behavior.⁷¹ The Court accepted the loose definition of mental illness and then reminded petitioners of the state’s powers to control those who pose dangers to society.⁷² The Court also disagreed with the Kansas Supreme Court’s assessment of the criminal nature of civil commitment.⁷³ Using the same factors utilized by the above-mentioned courts, the Court re-emphasized the earlier finding of the Washington Supreme Court that the legislature intended civil commitment to be civil and that it was not sufficiently punitive to warrant a criminal definition.⁷⁴ Furthermore, the Court found that using past criminal behavior did not make the statute punitive, but instead helped to support the finding of mental abnormality or dangerousness.⁷⁵ This holding creates a dangerous proposition that a past bad act can be the sole reason for a mental illness diagnosis and an involuntary civil commitment.

With circuits mulling over the definitions of “mental abnormality” and the legal requirements for civil commitment, the Court sought to clarify its ruling from *Kansas v. Hendricks* in *Kansas v. Crane*, described in the introduction to this Article.⁷⁶ While in front of the Kansas Supreme Court, the State claimed Crane was an exhibitionist with antisocial personality disorder, which met the mental illness requirement in *Hendricks*.⁷⁷ However, Crane claimed that involuntary commitment requires a showing that he is unable to control his dangerous behavior.⁷⁸ The Kansas Supreme Court agreed.⁷⁹ However, the U.S. Supreme Court again disagreed with the Kansas Supreme Court’s reading of the statute, stating there must be proof of “serious difficulty” in controlling behavior, not a total lack of control.⁸⁰ This decision leads to both empirical and legal

71. *Id.* at 358.

72. *Id.* at 356–57 (citations omitted).

73. *Id.* at 365–66.

74. See Jeremiah W. White, Note, *Is Iowa’s Sexual Predator Statute “Civil”?* *The Civil Commitment of Sexually Violent Predators After Kansas v. Crane*, 89 IOWA L. REV. 739, 749–53 (2004); see also *In re Young*, 857 P.2d 989, 996 (Wash. 1993).

75. *Hendricks*, 521 U.S. at 360–69.

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

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

78. See *id.* at 287.

79. *Id.* at 292–93.

80. See *Crane*, 534 U.S. at 413.

questions regarding what constitutes a lack of control justifying civil commitment and, thus, demands a more careful analysis of how courts should define mental illness so that those best served by criminal punishment remain within the criminal justice system.

In January 2009, a unanimous Fourth Circuit panel addressed 18 U.S.C. § 4248—which authorizes federal civil commitments—in *United States v. Comstock*.⁸¹ Section 4248 allows the federal government to “place in indefinite civil commitment ‘sexually dangerous’ persons, granting the federal government unprecedented authority over civil commitment—an area long controlled by the states.”⁸² The court found the statute unconstitutional because it allows the government to commit a person because of “sexual dangerousness” without alleging that the dangerousness violates federal law.⁸³ In addition, the court took issue with a policy allowing the federal government to civilly commit a person “even *after* that person has completed his prison sentence.”⁸⁴ This highlights one of the major ethical dilemmas with civil commitment—how can someone be rational enough to warrant punishment through criminal means, but then lack the ability to comprehend the nature of his or her actions and require civil commitment?⁸⁵ While *Comstock* focuses mainly on federalism and whether the Commerce Clause or the Necessary and Proper Clause warrant such a federal statute, it makes sure to elucidate that the power of “forcible, indefinite civil commitment [] is among the most severe wielded [power] by any government.”⁸⁶ If the Supreme Court were to grant certiorari, it might provide a much-needed analysis of not only civil commitment procedures but also the limits of federalism.

To better understand why transforming civil commitment into a preventative detention should not pass ethical muster in the judicial system, it is important to first understand the aims of the criminal and civil systems and the reasons why and how decision makers seek to incapacitate sex offenders for as long as possible.

III. “CIVIL” COMMITMENT

Typically, a sex offender first faces a prison sentence, which is a

81. *United States v. Comstock*, 551 F.3d 274 (4th Cir. 2009).

82. *Id.* at 275–76.

83. *Id.* at 276.

84. *Id.* (citing 18 U.S.C. § 4248(a), (d) (2006)).

85. *See, e.g.*, White, *supra* note 74, at 742.

86. *Comstock*, 551 F.3d at 284.

criminal punishment. Some theories of criminal punishment focus on retribution, which demands a repayment to society seeking to proportionally compensate for past bad acts.⁸⁷ A utilitarian approach to criminal punishment aims to ensure that losses from punishment outweigh the gains from a crime so that rational persons will not commit crimes.⁸⁸ Deterrence seeks to provide the “greatest good for the greatest number” through “swift, certain, and proportional” punishment which will guide rational actors into making decisions that comply with the law.⁸⁹ Thus, the criminal system is premised upon the idea that a person rationally and volitionally commits actions in such a way as to be deterred through incarceration or effective retribution.

Under SVP statutes, sex offenders then face involuntary civil commitment. The desire to civilly commit sex offenders in the name of public safety conflicts with the fundamental desire to be free, but states justify this deprivation for two principal reasons.⁹⁰ First, states can commit individuals under the *parens patriae* power of the state.⁹¹ The state seeks to care for those who are unable to care for themselves, creating a general public good by offering services to those who need them.⁹² States can also civilly commit through the police power with the intention of protecting the public from people who might harm themselves or others.⁹³ The state’s interest in public safety must outweigh the individual’s liberty interest in remaining free from involuntary commitment.⁹⁴ Indefinite, involuntary civil commitment should not be taken lightly, as the Court has found that there is a significant liberty interest that warrants due process protections and substantial proof before civil commitment.⁹⁵

87. See White, *supra* note 74, at 761 (citing JEREMY BENTHAM, THE RATIONALE OF PUNISHMENT 19 (1830)).

88. JEREMY BENTHAM, THE COLLECTED WORKS OF JEREMY BENTHAM: AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 166 (J.H. Burns & H.L.A. Hart eds., 1996) (citation omitted); see 3 ENCYCLOPEDIA OF CRIME AND PUNISHMENT 970–71 (David Levinson ed., 2002).

89. White, *supra* note 74, at 765 (citations omitted).

90. Stephen J. Morse, *Preventative Confinement of Dangerous Offenders*, 32 J.L. MED. & ETHICS 56, 58 (2004).

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

92. See, e.g., *Robinson v. California*, 370 U.S. 660, 664–65 (1962) (noting that a state-established program of compulsory treatment for those addicted to narcotics is one example of *parens patriae*).

93. *United States v. Salerno*, 481 U.S. 739, 748 (1987).

94. *Id.*

95. See *Addington*, 441 U.S. at 425.

To be civilly committed, the offender must be dangerous and also suffer from mental illness.⁹⁶ The civil commitment system seeks to provide treatment to an offender who does “not have the ability to completely choose his actions and control his behavior.”⁹⁷ The civil system is based upon irresponsibility, not culpability.⁹⁸ The Court in *Kansas v. Crane* failed to define the level of volitional impairment necessary to warrant commitment, so there is no set answer to the question of whether a sex offender meets the requirements of both systems.⁹⁹

Scalia noted this contradiction in his *Crane* dissent, stating that a substantial inability to control sexual behavior would invalidate any effects of deterrence because a mental abnormality would prevent rational decision making required by criminal punishment and deterrence.¹⁰⁰ A sex offender who does not meet the civil commitment requirements should face criminal punishment, while a sex offender who is mentally ill and dangerous should be civilly committed. Committing someone who does not have the requisite mental illness or dangerousness would amount solely to preventative detention, while putting someone in prison who meets the requirements would not achieve the goals of the criminal system. A sex offender cannot be responsible and rational enough for the purpose of a criminal sentence while simultaneously non-responsible for the purpose of civil commitment.¹⁰¹ “[T]he severity of the appropriate punishment necessarily depends upon the culpability of the offender”¹⁰² and mentally ill people face diminished capacities that limit their culpability and the effectiveness of criminal punishment. Courts which deny defendants the right to use a diminished capacity defense at their criminal trials for a sexual offense and then use evidence of lack of volitional control in their civil commitment hearing commit a “mockery of justice which places both . . . systems . . . in disrepute.”¹⁰³ While some people with mental

96. See, e.g., White, *supra* note 74, at 744.

97. *Id.* at 762–63 (discussing Iowa’s SVP statute).

98. See Stephen J. Morse, *Uncontrollable Urges and Irrational People*, 88 VA. L. REV. 1025, 1025–26 (2002) (“The basic justification for criminal confinement is that a culpable offender has been convicted of a crime; the basic justification for involuntary civil confinement is that the person is not responsible for his or her potentially dangerous conduct.”).

99. See *Kansas v. Crane*, 534 U.S. 407 (2002).

100. *Crane*, 534 U.S. at 420–21 (Scalia, J., dissenting).

101. See generally Morse, *supra* note 98.

102. *Atkins v. Virginia*, 536 U.S. 304, 319 (2002).

103. *In re Linehan*, 518 N.W.2d 609, 616 (Minn. 1994) (Gardebring, J., dissenting); see also Pfaffenroth, *supra* note 13, at 2251 (“Preventing certain criminal

abnormalities will slip into the criminal justice system through insanity defenses, the systems should be kept distinct. But what exactly is a “mental abnormality?”

A. Defining the Mental Illness Requirement

The statute in *Comstock* applied to one “who suffers from a severe mental illness such that he would ‘have serious difficulty in refraining from sexually violent conduct or child molestation if released.’”¹⁰⁴ The statute focuses not upon mental illness, but upon sexual dangerousness. However, the statute defines a “sexually dangerous person” as one who “has engaged or attempted to engage in sexually violent conduct or child molestation and who is sexually dangerous to others” without ever defining what sexually violent conduct or child molestation actually means.¹⁰⁵ This creates a circular definition without necessary explanation. Unfortunately, courts over the years have approached the definition of mental illness with just as much uncertainty.

In 1992, the Supreme Court declared in *Foucha v. Louisiana* that civil commitment requires both dangerousness and the presence of a mental disorder, with a nexus between the disorder and the threat of future harm.¹⁰⁶ Courts had consistently allowed an expansive definition of what constitutes mental illness. In *Foucha*, Justice O’Connor’s concurrence sought to replace “mental illness” with “some medical justification” in order to expand the state’s ability to commit.¹⁰⁷

In *Hendricks*, civil commitment required a link between future dangerousness and a “mental abnormality” or “personality disorder” that makes it difficult for a person to control his or her behavior.¹⁰⁸ It has been argued that this standard is not only broad, but “circular and transparent, and is essentially a non-standard that acts as dressing” for commitments.¹⁰⁹

defendants from introducing evidence of diminished capacity at their criminal trials, while using the same evidence to later commit them, is a significant contradiction.”).

104. United States v. Comstock, 551 F.3d 274, 277 (4th Cir. 2009) (quoting 18 U.S.C. § 4247(a)(6) (2006)).

105. 18 U.S.C. § 4247(a)(5).

106. See *Foucha v. Louisiana*, 504 U.S. 71, 86 (1992); Robert A. Prentky et al., *Sexually Violent Predators in the Courtroom: Science on Trial*, 12 PSYCHOL. PUB. POL’Y & L. 357, 368 (explaining that the Court’s language in *Foucha* strongly hints that antisocial personality disorder is not a mental illness for civil commitment purposes).

107. See *Foucha*, 504 U.S. at 88 (O’Connor, J., concurring).

108. *Kansas v. Hendricks*, 521 U.S. 346, 362 (1997).

109. Ahluwalia, *supra* note 31, at 509.

2009]

The Integrity of Sex Offender Civil Commitment

707

Looking to states using this standard, Aman Ahluwalia found that the broad standard allows courts to commit a person based upon past behavior and not an actual mental illness necessitating treatment.¹¹⁰

If, as Ahluwalia suggests, courts often use evidence of past crimes and concerns of recidivism rather than a showing of mental illness, the civil commitment system might be most effective with robbers. Robbers have a higher recorded detected recidivism rate than those who commit sexual offenses against children, so an indefinite commitment of robbers might prevent more future crimes than indefinite commitment of sex offenders.¹¹¹ The dangerousness prong would be met here, and it would serve the state's interest in preventing future crime. It would also likely meet the mental illness prong, as kleptomania has been defined as a mental illness as long as the stealing is not better diagnosed as conduct disorder, a manic episode, or antisocial personality disorder.¹¹² It would not be difficult to classify a repeat robber as a kleptomaniac and, thus, find that he meets this definition. Thus, in the same way a rapist could be diagnosed with a paraphilia and committed, so could a recidivist robber.

Of course, that sounds quite absurd. While robbery might have higher recidivism rates, there is not the same public outcry as when a sex offender recidivates. People do not believe that robbery permits the same deprivation of rights as sexual offenses, because a social stigma and fear of recidivism exist, which pervades public opinion of sex offenders. This example shows that detected recidivism alone should not warrant a civil commitment. In addition, limiting the definition to disorders stated in the *Diagnosis and Statistical Manual* (DSM) does not constitute a narrow enough definition, as the DSM does not seek to be a legal standard.¹¹³ If all DSM disorders served as mental abnormalities justifying civil commitment, not only would kleptomaniacs be committed, but also

110. *Id.* at 513 ("[T]he predisposition to commit sexual offenses is essentially derived from past sexual behavior, and therefore civil commitment is completely divorced from a medically diagnosable mental illness . . . [C]ivil commitment is based on nothing more than predicted recidivism.").

111. This hypothetical is based upon a classroom discussion moderated by Robert Schopp.

112. To be diagnosed with kleptomania, the person must also (1) have a recurrent failure to resist the impulse to steal, (2) feel tension immediately before the theft, (3) feel pleasure or relief while committing the theft, and (4) not steal solely to express anger or vengeance or in response to delusions or hallucinations. AM. PSYCHIATRIC ASS'N, DIAGNOSIS AND STATISTICAL MANUAL 613 (4th ed. 1994).

113. See, e.g., Prentky et. al., *supra* note 106, at 364; see also AM. PSYCHIATRIC ASS'N, *supra* note 112, at xxvii.

alcoholics and, until recently, all homosexuals.

In *Crane*, the Court also attempted to clarify the level of volitional impairment necessary to distinguish the sex offender from the “dangerous but typical recidivist convicted in an ordinary criminal case.”¹¹⁴ The Court found that a substantial lack of control was needed to meet due process.¹¹⁵ Unfortunately, the Court did not effectively define substantial “lack of control,” failing to clarify what amicus curiae briefs on both sides in *Hendricks* stated was an unworkable standard of volitional impairment.¹¹⁶ Desires are not physical forces and no “desire units” accumulate until the “action switch” flips.¹¹⁷ Furthermore, medical and legal professions have consistently rejected an irresistible impulse test, as it is perhaps impossible to determine what type of impulse is irresistible and what type is just not resisted by the sex offender.¹¹⁸ Nonresponsibility and lack of volition are “conceptually unclear and empirically unresolved,” leading to ineffective mental health expert testimony that is only a veiled attempt at finding a justification to incarcerate sex offenders expected to recidivate.¹¹⁹

B. Recidivism and Risk Assessment

High recidivism rates are one of the most powerful justifications for the current civil commitment procedure for sexual offenders. The fear that released sex offenders will almost certainly reoffend in their communities comes with much “political and emotional appeal, but little empirical substantiation.”¹²⁰ A potent example of this comes from New York, where Governor George Pataki mandated state correctional facilities and mental health centers to use the state’s involuntary civil commitment procedures to commit all sex offenders without offering treatment or rehabilitation.¹²¹ The Governor’s spokesman admitted this response to the public outcry against repeated sex offenders would “push the envelope,” and possibly

114. *Kansas v. Crane*, 534 U.S. 407, 413 (2002) (citation omitted).

115. *See id.* at 412–13.

116. *See id.* at 413 (stating that “lack of control” must contain “proof of a serious difficulty in controlling behavior”); *see also id.* at 411 (“[A]s different *amici* on opposite sides . . . agree, an absolutist approach is unworkable.”) (citation omitted).

117. Morse, *supra* note 90, at 63–64.

118. *See id.* at 64–65 (noting lack of objective measures and rejection of loss of control as an independent state).

119. *Id.* at 65.

120. Ahluwalia, *supra* note 31, at 494.

121. *See* Alan Feuer, *Pataki Uses State Law to Hold Sex Offenders After Prison*, N.Y. TIMES, Oct. 4, 2005, at B4.

violate the civil liberties of sex offenders.¹²² The New York Supreme Court Appellate Division found that preventative detention met the requirements of substantive due process.¹²³ As will be discussed later in this Article, courts have recently begun to find that using state power to prevent recidivism outweighs any need to offer treatment, despite questionable empiricism regarding recidivism statistics.¹²⁴

A 2005 Department of Justice (DOJ) report stated that sex offenders are more than four times as likely as non-sex offenders to be arrested for another sex crime after release.¹²⁵ However, the report fails to explain how this statistic should be interpreted. First, it must be noted that the sex crime rates are low for both groups—5.3% of sex offenders commit another sex crime and 1.3% of non-sex offenders commit a sex crime after release.¹²⁶ A recidivism rate of 5.3% does not warrant the same dramatic push for action. Second, sex offenders are more likely to commit non-sex crimes than sex crimes after release.¹²⁷ The report found a 43% recidivism rate for sex offenders committing any crime after release.¹²⁸ This is significantly less than the recidivism rate for non-sex offenders of 68%.¹²⁹ Third, this report is based solely on detected recidivism—rather than actual recidivism—because offenders are unlikely to report crimes they have not been caught committing and the police cannot estimate actual recidivism from detected recidivism.¹³⁰ Detected recidivism measures also exclude crimes that have not led to convictions and offenses that were plea-bargained down to a lesser offense.¹³¹ With an already low baseline of sexual offending, this can lead to insurmountable statistical errors when predicting sexual offender recidivism.¹³² Policy makers must recognize that

122. *Id.*

123. *State ex rel. Harkavy v. Consilvio*, 819 N.Y.S.2d 499, 507 (N.Y. App. Div. 2006).

124. *See infra* Part IV.D.

125. *See* OFFICE OF JUSTICE PROGRAMS, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS: CRIMINAL OFFENDERS STATISTICS (Aug. 8, 2007), available at <http://www.ojp.usdoj.gov/bjs/crimoff.htm#recidivism>.

126. *Id.*

127. *See id.*

128. *Id.*

129. *Id.*

130. *See id.*; *see also* OFFICE OF JUSTICE PROGRAMS, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS: CORRECTIONS STATISTICS (Jan. 9, 2009), available at <http://www.ojp.usdoj.gov/bjs/correct.htm>.

131. *See* Ahluwalia, *supra* note 31, at 525.

132. *See id.* at 533.

these numbers might not be rates of actual recidivism.¹³³ Overall, if the main interest of the judicial system is to use incarceration and deterrence to curb overall future offenses, the strongest efforts should be made to prevent non-sex offenders from committing any offense.

Another startling fact is that 40% of sex offenders who are caught committing another sex offense do so within one year after their release.¹³⁴ Looking back to the detected recidivism data, this means that less than 2.5% of released sex offenders are caught committing a sex offense within one year. This figure parallels the findings of a Washington state study which indicated a 2.7% sex offender recidivism rate.¹³⁵ Thus, by enforcing SVP statutes to civilly commit sex offenders following their release, the state might expend millions of dollars each year to curb less than 3% of sex offenders.

Dennis Doren, however, believes that sex offender recidivism is much more common than reports reveal.¹³⁶ Doren believes a conservative estimate for child molester recidivism is 52% when taking actual recidivism into account.¹³⁷ Of course, this relies solely on speculation. A meta-analysis released after Doren's statement used a longer follow-up period for sex offenders than previous studies, expecting a higher recidivism rate with the longer passage of time.¹³⁸ The study found a 13.4% sex offender recidivism rate for sex offenses, much lower than Doren's predictions but higher than the DOJ report.¹³⁹ The study also found overall (any crime) recidivism rates of 46.2% for rapists (18.9% for sexual offenses) and 36.9% for child molesters (12.7% for sexual offenses).¹⁴⁰ More importantly,

133. See, e.g., *id.* at 531.

134. OFFICE OF JUSTICE PROGRAMS, BUREAU OF JUSTICE STATISTICS: CRIMINAL OFFENDER STATISTICS, *supra* note 125.

135. Allison Morgan, Note, *Civil Confinement of Sex Offenders: New York's Attempt to Push the Envelope in the Name of Public Safety*, 86 B.U. L. REV. 1001, 1032 (2006).

136. Dennis M. Doren, *Recidivism Base Rates, Predictions of Sex Offender Recidivism, and the "Sexual Predator" Commitment Laws*, 16 BEHAV. SCI. & L. 97, 99–100 (1998) ("All research studies concerning the determination of sex offender recidivism base rates in previously convicted sex offenders share very significant shortcomings.").

137. *Id.* at 101.

138. See R. Karl Hanson & Monique T. Bussiere, *Predicting Relapse: A Meta-Analysis of Sex Offender Recidivism Studies*, 66 J. CONSULTING & CLINICAL PSYCHOL. 348, 351 (1998).

139. *Id.*

140. *Id.*

however, the study found that sex offenders are more likely to commit non-sexual crimes than sex offenses after release.¹⁴¹ This corresponds with findings that sex offenders “are among the least likely criminals to be rearrested for new crimes” despite public perception that sex offenders have the highest recidivism rate.¹⁴² Thus, treatment programs focused upon reducing sex offender recidivism should also take into account non-sexual offenses to truly reduce the risk of releasing a sex offender.

Despite “tremendous progress in sexual recidivism research over the past few decades,”¹⁴³ empirical research has yet to provide a recidivism test for sexually violent predators that has passed muster in both the scientific and legal communities.¹⁴⁴ The incredible variability regarding recidivism rates might not provide the required justification for recidivism to be the “rational basis” supporting civil commitment.¹⁴⁵ Accordingly, some have found that recidivism procedures are “so deficient that they undermine the validity of expert testimony . . .”¹⁴⁶

It is also important to consider whether clinical or actuarial models are more effective predictors of dangerousness and recidivism. Clinical judgments of dangerousness rely upon the subjective opinions of mental health professionals.¹⁴⁷ Actuarial risk assessment, however, requires a set mathematical model that assigns weight to particular predictors of dangerousness in order to create a quantitative prediction model.¹⁴⁸ While

141. See *id.*

142. Jill S. Levenson et al., *Public Perceptions About Sex Offenders and Community Protection Policies*, 7 ANALYSES SOC. ISSUES & PUB. POL’Y 137, 142 (2007) (citing PATRICK A. LANGAN ET AL., OFFICE OF JUSTICE PROGRAMS, U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS: RECIDIVISM OF SEX OFFENDERS RELEASED FROM PRISON IN 1994 (2003) (finding a 5.3% recidivism rate three years after release for 9,700 sex offenders)).

143. LeRoy L. Kondo, *The Tangled Web—Complexities, Fallacies and Misconceptions Regarding the Decision to Release Treated Sexual Offenders from Civil Commitment to Society*, 23 N. ILL. U. L. REV. 195, 195 (2003).

144. See generally *id.* at 197–201.

145. But see Morgan, *supra* note 135, at 1031–32 (stating that proponents of civil commitment cite high recidivism rates as a “rational basis” for civil commitments).

146. Nathaniel E. Plucker, *Debating the End of the World and Other Pointless Endeavors: Thomas v. State and the Civil Commitment of Sex Offenders in Missouri After Kansas v. Crane*, 47 ST. LOUIS U. L.J. 1151, 1159 (2003) (citation omitted).

147. See Prentky et al., *supra* note 106, at 371 (“Clinical risk assessment is, by definition, an exercise in human judgment.”).

148. See, e.g., William M. Grove & Paul E. Meehl, *Comparative Efficiency of Informal (Subjective, Impressionistic) and Formal (Mechanical, Algorithmic) Prediction Procedures: The Clinical–Statistical Controversy*, 2 PSYCHOL. PUB. POL’Y &

actuarial techniques have not been generally accepted as legally admissible evidence, researchers believe actuarial models might offer a better prediction of recidivism.¹⁴⁹ Actuarial models remove subjectivity and prevent the clinician from weighing factors differently in each case. Clinicians are human and are likely motivated to prevent false negatives, which would release offenders back into the community to commit other sexual acts. This is not to say that all experts oppose actuarial measures. Instead, experts claim that a structured clinical judgment should be used in sex offender risk assessment procedures.¹⁵⁰ Thomas Litwack explains that actuarial and clinical models must be tested on the same population to determine which type of models offer the highest reliability.¹⁵¹ Litwack also highlights that experts must test actuarial models with more clinically relevant measures such as imminence of sexual offender recidivism—something some actuarial models fail to assess.¹⁵²

Even though these concerns exist, other researchers state that using clinical models “is not only unscientific and irrational, it is unethical” because they are less efficient than statistical models.¹⁵³ In mental health courts, for example, judges often use a “collaborative, team-oriented approach” and utilize “a range of flexible responses, treatment programs, and close monitoring plans to reduce the risk of recidivism.”¹⁵⁴

Furthermore, the legal system does not lend itself to clinical risk assessments. For example, the courts use an “extremely likely to recidivate” standard to justify civil commitment.¹⁵⁵ What does this standard mean? It is highly unlikely that all experts, clinicians, and judges

L. 293, 293 (1996) (discussing the clinical method and actuarial method).

149. *Id.* at 293–95.

150. See, e.g., Thomas R. Litwack, *Actuarial Versus Clinical Assessments of Dangerousness*, 7 PSYCHOL. PUB. POL’Y & L. 409, 435 (2001) (“There is no evidence that actuarial assessments are superior to structured clinical assessments using modern assessment aids . . . and recent evidence . . . exists showing that structured clinical assessments can add to the validity of actuarial assessments.”).

151. *Id.* at 415.

152. *Id.* at 438.

153. See Grove & Meehl, *supra* note 148, at 320.

154. Shauhin Talesh, *Mental Health Court Judges As Dynamic Risk Managers: A New Conceptualization of the Role of Judges*, 57 DEPAUL L. REV. 93, 94 (2007).

155. See Ahluwalia, *supra* note 31, at 535–56 (“[T]he standard of commitment used by courts is well below the ‘extremely likely’ standard that is purportedly in use.”); see also Eric S. Janus & Paul E. Meehl, *Assessing the Legal Standard for Prediction of Dangerousness in Sex Offender Commitment Proceedings*, 3 PSYCHOL. PUB. POL’Y & L. 33, 35–36 (1997).

2009]

The Integrity of Sex Offender Civil Commitment

713

define a likelihood standard with the same evidentiary threshold, thus leading to a lack of uniformity in what type of dangerousness warrants a deprivation of fundamental liberties in the name of civil commitment.¹⁵⁶ An actuarial system provides less subjectivity and could lead to uniformity between jurisdictions regarding what level of predicted dangerousness warrants commitment. However, would combining actuarial risk scales provide an even stronger recidivism prediction?

Dr. Michael C. Seto tested this hypothesis in 2005 with actuarial risk scales for adult sex offenders. Seto combined four previously validated actuarial risk scales in novel ways to determine whether combining the results of the scales would significantly increase accuracy in sex offender detected recidivism predictions.¹⁵⁷ While Seto examined both multivariate statistical methods utilized in psychological research and medical decision making models, combining the measures did not fare any better than utilizing one solid actuarial scale.¹⁵⁸ Other researchers sought to combine actuarial and clinical risk scales to improve the accuracy of detected recidivism. Eric Janus and Paul Meehl found that an actuarial model with clinical adjustments has a 75% accuracy rate in predicting detected recidivism.¹⁵⁹

Research has found that rates of criminal behavior decrease steadily as one ages, with a peak in the mid-to-late teens.¹⁶⁰ Furthermore, both criminology and physiological research find that sexual behaviors decrease with age in both sex offender and “normal” samples.¹⁶¹ To fully integrate empirical findings regarding age and an actuarial prediction model,

156. See Prentky et al., *supra* note 106, at 372 (“[T]here is no assurance that risk thresholds are uniform or that risk assessments are performed using equivalent standards and procedures.”).

157. Michael C. Seto, *Is More Better? Combining Actuarial Risk Scales to Predict Recidivism Among Adult Sex Offenders*, 17 PSYCHOL. ASSESSMENT 156, 156 (2005).

158. *Id.*

159. Ahluwalia, *supra* note 31 at 535 (citing Janus & Meehl, *supra* note 155 at 55).

160. See Prentky et al., *supra* note 106, at 375–76; see also Richard Wollert, *Low Base Rates Limit Expert Certainty When Current Actuarials Are Used to Identify Sexually Violent Predators: An Application of Bayes’s Theorem*, 12 PSYCHOL. PUB. POL’Y & L. 56, 61–62 (2006).

161. See Ray Blanchard & Howard E. Barbaree, *The Strength of Sexual Arousal as a Function of the Age of the Sex Offender: Comparisons Among Pedophiles, Hebephiles, and Teleiophiles*, 17 SEXUAL ABUSE: J. RESEARCH & TREATMENT 441, 442–43 (2005).

theorists advise that, after determining a likelihood for recidivism, estimates should be reduced by two percent for every year after age sixty.¹⁶² With robust findings that recidivism rates decrease over time, researchers must determine if alleged effects of treatment are not simply effects of age instead.

C. Treatment

Meta-analyses provide mixed results regarding the effectiveness of treatment in reducing dangerousness and recidivism.¹⁶³ In 1989, Lita Furby and colleagues provided the first major meta-analysis of studies regarding sex offender recidivism and treatment.¹⁶⁴ In the meta-analysis of forty-two studies, the authors found no evidence that treatment reduces sex offender recidivism rates.¹⁶⁵ The studies varied in their follow-up periods and control group selection so much that “none of the forty-two studies permitted meta-analysis.”¹⁶⁶ If one study assessed recidivism at six months while another assessed recidivism at six years, it would be hard to compare the results because it cannot be assumed that the six-month rate would become the six-year rate as time progressed. Still, the study found that clinicians were not significantly better at predicting sexual recidivism than educated laypersons and that false positives often overshadowed true positives.¹⁶⁷ Accordingly, paid experts could “conclude anything one wants” for the courts.¹⁶⁸ In 1995, Hall found that only twelve of ninety-two sex offender studies met the meta-analysis requirements.¹⁶⁹ While an improvement on the Furby findings, it is hardly a number to celebrate. The

162. Prentky et al., *supra* note 106, at 376–77.

163. See, e.g., Karen Kersting, *New Hope for Sex Offender Treatment: Research Suggests Psychological Treatment Helps Reduce Recidivism Among Convicted Sex Offenders*, MONITOR ON PSYCHOL., July–Aug. 2003, at 52.

164. Lita Furby et al., *Sex Offender Recidivism: A Review*, 105 PSYCHOL. BULL. 3 (1989); see also Kondo, *supra* note 143, at 197.

165. See Kondo, *supra* note 143, at 197.

166. *Id.*; see also Furby et al., *supra* note 164, at 21.

167. Kondo, *supra* note 143, at 197 (citing Vernon L. Quinsey & Rudolf Ambtman, *Variables Affecting Psychiatrists’ and Teachers’ Assessments of the Dangerousness of Mentally Ill Offenders*, 47 J. CONSULTING & CLINICAL PSYCHOL. 353, 355 (1979)).

168. *Id.* (citing Vernon L. Quinsey & Terry C. Chaplin, *Stimulus Control of Rapists’ and Non-Sex Offenders’ Sexual Arousal*, 6 BEHAV. ASSESSMENT 169, 169–70 (1984)).

169. *Id.* at 198 (citing Gordon C. Nagayama Hall, *Sexual Offender Recidivism Revisited: A Meta-Analysis of Recent Treatment Studies*, 63 J. CONSULTING & CLINICAL PSYCHOL. 802 (1995)).

meta-analysis found that some studies reported that treatment significantly decreased recidivism (i.e., 15% after treatment as opposed to 68% without treatment in one study).¹⁷⁰ Overall, though, studies failed to find a treatment effect and still suffered from methodological limitations such as small sample sizes and inadequate data.¹⁷¹

In 1996, a meta-analysis with 11,000 participants found that treatment reduced sexual recidivism rates from 18.7% to 13%.¹⁷² This study provided the first true analysis of whether the type of sex offender impacts the offenders' treatment success.¹⁷³ Treatment given to child molesters significantly reduced sexual recidivism rates (14.4% versus 25.8%), while treatment to rapists provided a negligible effect (20.1% versus 23.5%).¹⁷⁴ Accordingly, it might be necessary to consider these groups separately in future research on recidivism and treatment effectiveness.¹⁷⁵

Research finds that rapists' sexual recidivism could be predicted by phallometric deviation, which often involves the measuring of the rapist's penis circumference while watching coercive and noncoercive sexual scenarios.¹⁷⁶ However, this method has been criticized as prone to assessment error and lacking in substantial validity.¹⁷⁷ A second study found that the sexual recidivism rate of child molesters correlated with (1) prior convictions for sex and property crimes, (2) personality disorders, (3) sexual interest in children in phallometric deviation, and (4) marital status.¹⁷⁸ However, this raises concerns. A requirement of being a convicted child molester means that there must have been a prior conviction regarding a sexual act with a child. Thus, there will automatically be a prior conviction and sexual interest in children, meeting both the first and third elements. Regarding the second element, as many as 75% of those individuals in prisons suffer from antisocial personality

170. *See id.*

171. *See id.*

172. *Id.* at 199.

173. *See id.*

174. *Id.*

175. *See id.*

176. *Id.* at 200.

177. *See* Richard J. Howes, *Circumferential Change Scores in Phallometric Assessment: Normative Data*, 15 SEXUAL ABUSE: J. RESEARCH & TREATMENT, 365, 373 (2003).

178. *See* Marnie E. Rice et al., *Sexual Recidivism Among Child Molesters Released from a Maximum Security Psychiatric Institution*, 59 J. CONSULTING & CLINICAL PSYCHOL. 381, 383, 385 (1991).

disorder.¹⁷⁹ Accordingly, a criterion which includes three-quarters of the population will not provide enough variability for a strong empirical analysis of recidivism rates. Eliminating the first three factors, the recidivism question really comes down to: is he single? This seems an unlikely justification for civil commitment to a setting of questionable treatment effectiveness.

Psychologists continue to state that if sex offenders do not receive treatment, civil commitment becomes “ultimately disingenuous as they condone life imprisonment for any sex offender judged dangerous.”¹⁸⁰ Civil commitment would become nothing more than preventative detention and a “dumping ground” for sex offenders the state does not want to release due to fears of recidivism.¹⁸¹ But the Supreme Court has consistently shown a tolerance for “meager treatment efforts” and the “limited role of treatment.”¹⁸²

In the Court’s opinion in *Hendricks*, Justice Thomas bluntly states that civil commitment is acceptable even if there is no available treatment.¹⁸³ Justice Breyer replied in his dissent that the lack of treatment available removes the rehabilitative function of civil commitment and makes the civil commitment scheme punitive and criminal in intent.¹⁸⁴ However, the majority found that, no matter how minuscule, if treatment is mentioned, it fits the requirement of civil commitment and does not make the procedure criminal.¹⁸⁵ This stems partly from the recategorization of civil commitment as an exercise of police power rather than as a rehabilitation approach. With police power commitments, treatment is a right—as opposed to a justification—for those committed as the goal

179. Kansas v. Crane, 534 U.S. 407, 412 (2002) (citing Moran, *supra* note 59, at 234).

180. Nora V. Demleitner, *Abusing State Power or Controlling Risk?: Sex Offender Commitment and Sicherungverwahrung*, 30 FORDHAM URB L.J. 1621, 1655 (2003).

181. Mental Health America, Confining “Sexual Predators” in the Mental Health System, <http://www.mentalhealthamerica.net/go/position-statements/55> (last visited Apr. 27, 2009).

182. Prentky, et al., *supra* note 106, at 380 (internal quotations omitted).

183. Kansas v. Hendricks, 521 U.S. 346, 366 (1997) (“[W]e 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.”).

184. *See id.* at 383 (Breyer, J., dissenting) (“[A] statutory scheme that provides confinement that does not reasonably fit a practically available, medically oriented treatment objective, more likely reflects a primarily punitive legislative purpose.”).

185. *See id.* at 368–69.

becomes to protect society and not to rehabilitate.¹⁸⁶

Combined with a loose definition of mental illness, courts which err on the side of allowing the state's police power to trump individual rights use civil commitment as a way of extending criminal sentences under a different name. Theorists should not turn a blind eye to the ethical concerns of civil commitment that might undermine the integrity of the judicial system.

IV. A GUIDE TO BETTER RESEARCH AND PROPOSED SOLUTIONS

Without much empirical support, courts rely on questionable detected recidivism data and a loose definition of mental illness to preventatively detain sex offenders. *Comstock* brings the constitutionality of preventative detention back into the spotlight, but court decisions and public opinion continue to keep sex offenders away from the community longer, whether for rehabilitation or incarceration purposes.¹⁸⁷ Stronger empirical support and a deeper analysis into the ethics of the system are necessary to justify the civil commitment process for sex offenders.

A. Social Psychology Research

Social psychologists have not extensively studied society's response to sex offenders. Studies could explore whether moral outrage leads to prejudicial treatment of sex offenders. Prejudice, an automatic process that leads to differential evaluation on group members, can result from people making quick judgments based on how a person fits into their preconceived notions regarding a particular group.¹⁸⁸ Terms such as "sexually violent predator" might increase prejudice further because the term itself invokes savage animal imagery, which could cognitively bias any layperson or trier of fact. Overall, "the collective idea is that only sick and dangerous persons would ever be charged with sexually violent offenses, and therefore civil commitment must be appropriate in the eyes of a jury."¹⁸⁹ It

186. Prentky et al., *supra* note 106, at 380; *see also* Rouse v. Cameron, 373 F.2d 451, 452-56 (D.C. Cir. 1966) (explaining that the right to treatment extends to those involuntarily committed according to statute).

187. See Fred Cohen, *The Law and Sexually Violent Predators—Through the Hendricks Looking Glass*, in *THE SEXUAL PREDATOR: LAW, POLICY, EVALUATION AND TREATMENT* 1-2 (Anita Schlank & Fred Cohen eds., 1999).

188. See, e.g., Laurie A. Rudman et al., "Unlearning" Automatic Biases: *The Malleability of Implicit Prejudice and Stereotypes*, 81 J. PERS. & SOC. PSYCHOL. 856 (2001) (prejudice study).

189. White, *supra* note 74, at 763 n.168.

is unconstitutional and unethical to keep sex offenders away from society based solely on fear, stigma, and prejudice. The public purpose must outweigh the deprivation of liberty. Yet, even without convincing proof that treatment and rehabilitation work or are needed to justify civil commitment, courtrooms across the nation continue to commit sexual offenders in what can easily become a life sentence without any chance of parole.

B. Economic Research

What is the cost of a system where it is “virtually impossible” for a sex offender to be released from civil commitment?¹⁹⁰ Less than one percent of civilly committed sex offenders are ever released.¹⁹¹ The cost of false positives is great as civil commitment of sex offenders who are unlikely to recidivate both increases the program’s costs and decreases the availability of beds for those who truly deserve a prison sentence or commitment. In California, for example, the average inmate costs the state \$30,000 each year.¹⁹² The average committed sex offender in California costs \$107,000.¹⁹³ In a time of budget cuts, civil commitment programs are often minimized.¹⁹⁴ However, releasing all of the committed sex offenders back onto the streets in one quick maneuver is not the correct answer. Instead, states must continue to examine the cost-effectiveness of treatment programs and their ability to provide actual treatment.

C. Clinical and Forensic Research

Although the number of methodologically valid studies has increased over the past twenty-five years, researchers must take into account the base rate of sexual recidivism for the particular population assessed.¹⁹⁵ If the base rate of sexual offenses is particularly low, then the research design

190. *Id.* at 747–48 (discussing costs of implementing and maintaining SVP statutes).

191. *Id.* at 747.

192. RICHARD BERK, DEP’T OF STATISTICS, UCLA, CONDUCTING A RANDOMIZED FIELD EXPERIMENT FOR THE CALIFORNIA DEPARTMENT OF CORRECTIONS: THE EXPERIENCE OF THE INMATE CLASSIFICATION EXPERIMENT 1 (2004), <http://repositories.cdlib.org/uclastat/papers/2004011201>.

193. White, *supra* note 74, at 748 n.56.

194. See, e.g., Morgan, *supra* note 135, at 1017 (“Kansas is currently attempting to scale back its civil confinement program, relying on increased sentences and less costly methods of monitoring sex offenders after they are released.”).

195. See JOHN MONAHAN, THE CLINICAL PREDICTION OF VIOLENT BEHAVIOR 33–35 (1981).

must take into account that low base rate, or experimental error will result.¹⁹⁶ With such a low base rate for recidivism, it has been argued that it is statistically more reliable to release all sex offenders than to commit any of them as doing so will better reflect the rates of reoffending.¹⁹⁷ This, of course, would not be sound policy as sexual offenses are likely underreported and releasing all offenders back into society would create a public outcry resulting in significant turnover of elected officials and judges.

Other researchers claim that it is not the ignorance of base rates but, rather, the extreme variability of them that makes recidivism predictions questionable.¹⁹⁸ The title “sex offender” combines child molesters, serial rapists, incestual persons, and others.¹⁹⁹ This heterogeneity makes average dangerousness predictions likely to “seriously misestimate the likelihood of violence.”²⁰⁰ The representativeness heuristic also applies.²⁰¹ The representativeness heuristic states that people will assume that an exceptional outcome is the expected outcome.²⁰² Thus, a story of a sex offender released into the community and reoffending will remain in the community’s memory and be used to justify the perception that most sex offenders are the same way.

Research on recidivism and treatment success also faces significant limitations. Robert Prentky addressed some of these limitations within his analysis of how courts should view scientific evidence on dangerousness.²⁰³ These limitations include the fact that not enough sex offenders classified as dangerous have been released from prison or civil commitment settings back into the community to permit proper data analyses.²⁰⁴ States, of course, cannot randomly release people classified as sexually violent predators so that researchers can track recidivism rates in a true experiment. However, if the majority of sexually violent predators remain

196. *See id.*

197. *See id.* at 46–50.

198. Prentky et al., *supra* note 106, at 373.

199. *See id.* at 362–70 (discussing various mental disorders which may lead to categorization as a sex offender).

200. Deborah Davis & William C. Follette, *Rethinking the Probative Value of Evidence: Base Rates, Intuitive Profiling, and the “Postdiction” of Behavior*, 26 *L. & HUM. BEHAV.* 133, 149 (2002).

201. *See* Prentky et al., *supra* note 106, at 375.

202. *See id.*

203. *Id.* at 380–81.

204. *Id.* at 380.

incarcerated or civilly committed, accurate estimates of recidivism cannot be obtained.

In addition, clinical and forensic research should consider evidence that not all types of sex offenders recidivate at the same rate.²⁰⁵ For example, “evidence suggests that rapists recommit rape with greater frequency than pedophiles recommit pedophilia . . . again suggesting that sex offenders are not the homogenous group that sex offender laws lead us to believe.”²⁰⁶ Again, this assertion is based upon detected recidivism rates, which show that most sex offenders do not recommit the sex crime that resulted in their first arrest.²⁰⁷

Effective research on treatment and recidivism requires sex offenders to gain skills through treatments while committed and then use those skills when released back into the community. Treatment must be provided in the least restrictive environment possible. However, with the Supreme Court suggesting that civil commitment does not necessarily require treatment, proposed solutions mentioned in this Article focus more on structural components of the systems rather than enhancing treatment effectiveness.

D. Proposed Solution 1: Extended Criminal Sentence

Some theorists claim that civil commitments are solely preventative detention measures.²⁰⁸ When civil commitment directly follows a criminal sentence, the state utilizes a procedure the Supreme Court has found to be civil.²⁰⁹ However, many theorists state that this explicitly violates civil commitment’s main purpose of rehabilitating and, instead, is a criminal punishment.²¹⁰

One proposed solution is to extend criminal sentences.²¹¹ Civil commitment is more expensive than incarceration, and the treatment

205. Lisa L. Sample & Timothy M. Bray, *Are Sex Offenders Different? An Examination of Rearrest Patterns*, 17 CRIM. JUST. POL’Y REV. 83, 93–97 (2006).

206. *Id.* at 94.

207. *Id.*

208. See Eric Janus, *Civil Commitment as Social Control: Managing the Risk of Sexual Violence*, in DANGEROUS OFFENDERS: PUNISHMENT AND SOCIAL ORDER 74 (Mark Brown & John Pratt eds., 2000); see also Ahluwalia, *supra* note 31, at 490–91.

209. See *Kansas v. Hendricks*, 521 U.S. 346, 361 (1997).

210. See, e.g., Pearce, *supra* note 27.

211. See White, *supra* note 74, at 773–74 for a discussion of this proposed solution.

procedures have questionable effectiveness, if they are administered at all.²¹² Thus, this solution would reduce costs and also meet the public's demand to keep sex offenders locked up in the name of public safety. In addition, this would allow the justice system to remove the "cloak" that has been thrown on top of the sex offender civil commitment system to hide when the courts permitted preventative detention without mental illness justification to further public safety purposes.²¹³

However, while this could be "the smartest solution,"²¹⁴ longer sentences also create a new ethical dilemma.²¹⁵ To confine all sex offenders to criminal punishment would place those with mental illnesses or volitional impairments into a system of punishment aimed at deterrence and incarceration for those able to appreciate their actions. Jeremiah White encourages an expansion of treatment programs within prison.²¹⁶ However, would this then create a civil setting within criminal punishment? Persons unable to appreciate their actions would now face criminal punishment focused on deterrence. In addition, it would be unlikely that these people would obtain necessary treatment when mental health services within prison settings are already stretched thin, and budget shortfalls would likely prevent a great expansion of treatment offerings.

In addition, this proposed solution assumes that recidivism rates are so high that the courts should deny sex offenders their liberty rights in order to protect the community. As stated above, recidivism rates are questionable within the sex offender population and no true test has been methodologically accomplished because so few sex offenders are ever released from civil commitment. By placing the mentally ill within the criminal system, a state would be buying into the social stigma that sex offenders are sick and untreatable and also be implicitly asking, "Why even try to treat?" A better system might find a way to combine the aims of the civil and criminal systems without blurring the boundaries.

212. *Id.* at 774.

213. See Paul H. Robinson, *Punishing Dangerousness: Cloaking Preventive Detention as Criminal Justice*, 114 HARV. L. REV. 1429 (2001) (arguing that the shift "of the criminal justice toward the detention of dangerous offenders—is a move in the wrong direction").

214. White, *supra* note 74, at 773.

215. Morse, *supra* note 90, at 67 ("Lengthening sentences on retributive grounds keeps criminal punishment within desert/disease constraints, but it strains at the limits of desert and the gains in public safety are not worth the costs.").

216. White, *supra* note 74, at 773–74.

E. Proposed Solution 2: Lessons from Iowa's System and Germany's Old System

Within the legislative findings of Iowa Code section 229A.1, the General Assembly determined that sexually violent predators are very likely to recidivate.²¹⁷ The findings also include the assertion that there is a group of sexually violent predators who do not have a mental disease or defect; rather, they have “antisocial personality features that are unamenable to existing mental illness treatment modalities and that render them likely to engage in sexually violent behavior.”²¹⁸

This differentiation is important to maintain so that not all sex offenders are treated as a homogenous, mentally ill group. Expanding upon this definition, the Iowa Code then states that sexually violent predators require long-term treatment different from what a mentally ill person civilly committed in Iowa receives under Chapter 229 of the Iowa Code.²¹⁹ The Iowa General Assembly took a skeptical view toward treatment effectiveness, but noted that sexually violent predators should have “full, meaningful participation . . . in treatment programs.”²²⁰

The Iowa Code also defines “mental abnormality” as “a congenital or acquired condition affecting the emotional or volitional capacity of a person and predisposing that person to commit sexually violent offenses to a degree which would constitute a menace to the health and safety of others” and then defines the sexually violent offenses included.²²¹ Furthermore, a preliminary determination process assures that there must be probable cause for a person to be named as a sexually violent predator.²²² This system provides the offender with the full petition and notice of all procedures required.²²³

The Iowa system shares many similarities with the German *Sicherungswahrung*, in which imprisonment precedes a treatment and rehabilitation procedure.²²⁴ This procedure only applies if the offender has already been sentenced to two prison terms of at least one year, has spent at least two years in prison for an offense, currently faces a possible

217. IOWA CODE § 229A.1 (2009).

218. *Id.*

219. *Id.*

220. *Id.*

221. *Id.* § 229A.2.

222. *Id.* § 229A.5.

223. *Id.*

224. Demleitner, *supra* note 180, at 1623.

imprisonment of at least two years, and poses a danger to the public due to recidivism.²²⁵ Recent enactments have permitted a life-long civil commitment, extending beyond the previous limit of ten years.²²⁶ More importantly, courts have illustrated their understanding of the difference between criminal and civil penalties, as “there seems to be an inverse relationship between the length of imprisonment and length of [commitment].”²²⁷ The German courts correctly believe that imposing a long criminal sentence and then a long civil commitment does not make sense—civil commitment implies an impaired mental state, which makes the goals of criminal punishment unlikely to be obtained.

However, the German system suffers from the same recidivism assessment problems as the American system. In 60% of cases, an expert found a mental disorder; in almost all of those cases, the expert made a dangerousness assessment, which is required for *Sicherungsverwahrung*.²²⁸ When the expert found an offender was dangerous, the courts imposed the civil commitment.²²⁹ When the expert did not find dangerousness, the court appointed a second expert who did.²³⁰ Thus, if the judge wanted an offender committed, he was committed regardless of how dangerous experts found him. In addition, analysis by Nora Demleitner found that an offender’s prior record had the most predictive power.²³¹ Thus, the German system might be using the same type of “double jeopardy” approach (allowing one conviction to be the reason for a resulting civil commitment) that undermines the American system. Even with this flaw, it is admirable to fully explain the civil commitment component before the criminal punishment is imposed. Studies show that dangerousness predictions are better shortly after commission of the offense, which might mean that dangerousness assessments before the criminal sentence (as opposed to after) would result in more accurate predictions that could better serve both society and the individual.²³² This not only allows the offender to understand the punishment that lies ahead, but may also help courts better reconcile the civil and criminal components of the judicial

225. *Id.* at 1644–45 (citation omitted).

226. *Id.* at 1646 (citation omitted).

227. *Id.* at 1647 (citation omitted).

228. *Id.* at 1651.

229. *Id.* (citation omitted).

230. *Id.* (citation omitted).

231. *Id.* (citation omitted).

232. See Eric S. Janus, *Preventing Sexual Violence: Setting Principled Constitutional Boundaries on Sex Offender Commitments*, 72 IND. L.J. 157, 182 (1996).

system by putting both decisions within close temporal proximity.

While both the Iowa and German approaches offer respectable qualities, neither system is perfect. The best approach must not sentence sex offenders with mental illness to criminal punishments when their lack of control corresponds more with civil commitment. This two-tiered usage of the criminal and civil systems creates a precedent that a sex offender can be rational enough to punish, but too irrational to release back into the community.

White suggests that the civil and criminal systems must be mutually exclusive in a system in which the possibility of civil commitment is waived if a prosecutor does not request an initial probable cause hearing under Iowa Code section 229A.4.²³³ Early notice allows the sex offender to know what charges he or she faces, thus allowing the offender to formulate a legal strategy focused upon the entire set of possible outcomes, rather than first addressing criminal charges and then a civil commitment just as the offender is about to be released. Under White's approach, sexual, civilly committable persons are individuals "determined by a jury, by clear and convincing evidence, to have a mental illness, disease, defect, or abnormality that produces a substantial and serious inability to control sexual impulses and behavior, thereby rendering criminal sentencing and punishment inappropriate and unnecessary."²³⁴ When a multidisciplinary professional team makes a unanimous decision that the offender is a sexual, civilly committable person, the offender can ask for a civil jury trial in which the jury must find that the offender has a mental condition, thus undermining the goals of deterrence.²³⁵ If, however, the offender has been (1) convicted of multiple sexually violent offenses, (2) has the ability to control sexual impulses and desires, and (3) is very likely to recidivate if not confined, White proposes the person should be declared a "sexually violent predator" instead.²³⁶ Then, a criminal jury trial would commence to determine whether the person is a sexually violent predator beyond a reasonable doubt and, thus, eligible for a mandatory sentence without parole.²³⁷

The system's strong delineation works well for judicial efficiency and it assures that the hybrid system keeps civil commitment and criminal

233. White, *supra* note 74, at 769.

234. *Id.*

235. *Id.* at 769–70.

236. *Id.* at 771.

237. *Id.* at 772.

punishment distinct. If the civil system denies the sex offender some rights that were previously afforded, that is a burden the system must bear for the sake of a clear distinction. Still, the system does not remedy all of the current system's ills. For example, what does "mental illness, disease, defect or abnormality" mean and what level of volitional impairment constitutes a "substantial and serious inability to control?" These questions need answers before civil commitment can occur. However, White's approach could make great strides toward creating an ethical system of treating sex offenders.

F. Proposed Solution 3: Jury Instruction

Some theorists believe it is better to increase the ethical soundness of the system from within its boundaries rather than create a new system. One such method requires specific instructions regarding the lack of control element found in *Crane*.²³⁸ While Illinois and Massachusetts have ruled that such an instruction is not required,²³⁹ the Missouri Supreme Court found that "*the jury must be instructed* that the degree to which the person cannot control his or her behavior reaches the level of 'serious difficulty.'"²⁴⁰ By requiring a jury instruction, courts could assure that alleged sex offenders are not civilly committed without a showing of volitional impairment. While this would not help define what level of impairment is necessary, it would remind jurors of the requirements to justify commitment.²⁴¹ The Iowa Supreme Court has also suggested a jury instruction.²⁴² In *State v. Garrett*, the Iowa court found that "mental abnormality" must also require a showing of serious difficulty in controlling behavior.²⁴³

However, this assumes that a jury instruction will actually work. Previous research has shown that jurors have difficulty comprehending instructions in death penalty cases.²⁴⁴ If jurors make decisions regarding the death penalty without fully understanding the instructions, how can one

238. See *Kansas v. Crane*, 534 U.S. 407 (2002).

239. *Plucker, supra* note 146, at 1176–77; see *People v. Hancock*, 771 N.E.2d 459, 463–64 (Ill. App. Ct. 2002); *In re Util*, 768 N.E.2d 1055, 1061–62 (Mass. 2002).

240. *Plucker, supra* note 146, at 1171 (citing *Thomas v. State*, 74 S.W.3d 789, 791 (Mo. 2002)).

241. See *Plucker, supra* note 146, at 1179–80.

242. See *State v. Garrett*, 671 N.W.2d 497, 501 (Iowa 2003).

243. See *id.* at 500.

244. See Richard L. Wiener, *Death Penalty Research in Nebraska: How Do Judges and Juries Reach Penalty Decisions?*, 81 NEB. L. REV. 757, 768–69 (2002).

assume that adding a jury instruction regarding the *Crane* volitional requirement will serve justice more effectively? In addition, reminding jurors that civil commitment requires an inability to control impulses or desires creates a complex ethical dilemma for jurors. If a defendant wishes to avoid civil commitment, he should seek to prove that his acts are “willful and intentional.”²⁴⁵ Thus, for an accused child molester to avoid civil commitment, he must prove that he intentionally committed the sexual acts against children. Believing that jurors will understand the jury instruction and find that the child molester’s willful acts demand him to be set free on the streets rather than be civilly committed is “highly illogical.”²⁴⁶

G. *Proposed Solution 4: Returning to the True Intent of Civil Commitment*

Legislatures and courts should be reminded of the true purpose of civil commitment and enact definitions of mental illness and dangerousness so that states can effectively balance society’s interest with the rights of individuals. The civil system should not be used for preventative detention unless the offender is severely impaired, dangerous, and not treatable.²⁴⁷

To continue individual rights, states should offer individual treatment plans. If the goal is to treat the individual, placing him in a restrictive setting without access to treatment is purely incarceration without rehabilitation. *Hendricks* legally permits states to deny some treatment, but this undermines the judicial integrity of the system and the goal of the civil commitment process. Treatment is necessary to rehabilitate the offender and allow the offender to return to society when the dangers upon entry into the judicial system are no longer present. This rehabilitation is likely to differ between different offenders and individual treatment programs should take this into account. For example, child molesters and rapists should be provided different treatment plans which cater to their needs and predictors of recidivism within their respective populations. With high false positives combining with the high cost of civilly committing individuals, states are at the point when unnecessary preventative detention will hurt not only judicial integrity, but also the budget of the entire state (a result more likely to create legislative enactments). If the goal of civil commitment is to return the offender to society, keeping the offender locked away in a restrictive prison setting with other offenders

245. See *Plucker, supra* note 146, at 1180.

246. *Id.* at 1180.

247. This solution is based, in part, on the reasoning of Edward P. Ra. See Edward P. Ra, *The Civil Confinement of Sexual Predators: A Delicate Balance*, 22 ST. JOHN’S J. LEGAL COMMENT. 335 (2007).

2009]

The Integrity of Sex Offender Civil Commitment

727

will not achieve this objective. In the delicate balance between the state's power to protect and the individual's fundamental liberty interests, this solution would help both the public and individual by limiting "the restriction on an individual's liberty to no more than what is necessary for the protection of the public."²⁴⁸

V. CONCLUSION

As one scholar stated, current civil commitment of sex offenders "is bad law, bad social policy, and bad mental health."²⁴⁹ Civil commitment laws are arguably pretextual, assigning criminal punishments under the guise of civil commitment so that sex offenders can be confined longer than their criminal punishment allows. The Fourth Circuit recently found the federal commitment statute unconstitutional.²⁵⁰ However, the Supreme Court has strongly stated that civil commitments are indeed civil.²⁵¹ Future case law must consider the ethical dilemmas surrounding this distinction. In particular, the current civil commitment system allows society to continue to treat sex offenders as third-class citizens not worthy of the rights other prisoners receive. The civil commitment system also allows extensive commitments without treatment, which appear no different than life sentences in a civil setting. While there is an old saying that those who do not study the past are doomed to repeat it, Supreme Court decisions seem to embrace the past, returning treatment of sex offenders to a system in which there was no treatment at all—only criminal punishment and social stigma.

248. *See id.* at 367–68 (citing *Kansas v. Hendricks*, 521 U.S. 346, 388 (1997) (Breyer, J., dissenting)).

249. Michael L. Perlin, "*There's No Success Like Failure/And Failure's No Success At All*": *Exposing the Pretextuality of Kansas v. Hendricks*, 92 NW. U. L. REV. 1247, 1249 (1998).

250. *See United States v. Comstock*, 551 F.3d 274 (4th Cir. 2009).

251. *See, e.g.*, *Kansas v. Hendricks*, 521 U.S. 346, 347 (1997).