Out of Sight, Out of Mind: An Analysis of Kansas V. Crane and the Fine Line between Civil and Criminal Sanctions

Franklin T. Wilson

The Prison Journal 2004 84: 379
DOI: 10.1177/0032885504268186

OUT OF SIGHT, OUT OF MIND: AN ANALYSIS OF *KANSAS V. CRANE* AND THE FINE LINE BETWEEN CIVIL AND CRIMINAL SANCTIONS

FRANKLIN T. WILSON
Sam Houston State University

The social intolerance surrounding repeat sexual offenders has spawned numerous legal remedies through the years including sexual psychopath laws, Megan's Law, chemical castration, and sexually violent predator (SVP) legislation. In the past 12 years, several states have implemented what many consider to be the resurrection of the old sexual psychopath laws of the 1930s and 1940s. This newest legal remedy is most often referred to as SVP legislation and allows for the indefinite civil commitment of those offenders who have served their prison sentences but have been determined to be SVPs still. Based on this legislation, this article analyzes the impact of the U.S. Supreme Court case of Kansas v. Crane*, the latest in a series of cases that address an issue that many feel runs dangerously close to crossing the fine line between civil commitment and criminal sanctions.*

Keywords: *civil commitment; Kansas; Hendricks; Crane; Kansas Sexually Violent Predator Act; sexually violent predator*

It is safe to say that society finds violent and sexual offenses intolerable. The knowledge that such offenses have occurred numerous times only serves to amplify society's disdain for the acts and their perpetrators. Consequently, this social intolerance has led to numerous methods of addressing such issues. Potter and Kappeler (1998) pointed out that the 1930s and 1940s experienced an enormous panic about the presumed presence of *sex fiends*. This panic ultimately resulted in the State of Michigan passing the first sexual psychopath laws and eventually led to a total of 28 states passing such laws (Potter & Kappeler, 1998; Websdale, 1996). These laws provided for the confinement of offenders who were determined by psychiatrists to suffer from some form of sexual dysfunction (Potter & Kappeler, 1998). The

THE PRISON JOURNAL, Vol. 84 No. 3, September 2004 379-394
DOI: 10.1177/0032885504268186

offender could be held indeterminately until the state found him to be cured. Grant Morris (2000) reported that for years, states utilized sexual psychopath laws but ultimately deemed such laws to be inadequate. This was primarily because of the prevailing belief that sex offenders did not suffer from any mental illness and therefore were not candidates for treatment (Websdale, 1996). However, in the past 12 years, several states have implemented what many consider to be the resurrection of the old sexual psychopath laws as sexually violent predator (SVP) legislation.

In general, SVP legislation allows for the indefinite civil commitment of those offenders who have served their prison sentences but have been determined to still be SVPs. Although Washington was the first state to implement such legislation (La Fond, 1999), the Kansas Sexually Violent Predator Act (KSVPA) has received the most attention, reaching before the U.S. Supreme Court twice within a 5-year period. This analysis of the KSVPA and, more specifically, the importance of the *Kansas v. Crane* (2002) case with regard to civil commitment statutes for sexual predators in general is not intended to imply that one form of legislation is better than the other. Nor is intended to overlook the often harsh and intrusive nature of such acts. Rather, the purpose of this analysis is to examine the latest in a series of cases that address an issue that many feel runs dangerously close to crossing the fine line between civil commitment and criminal sanctions.

The *Kansas v. Hendricks* (1997) case, the first of two Supreme Court cases originating from the KSVPA, "can be viewed as a logical, if extreme, development in a 30-year-long process: the progressive triumph of the 'dangerousness' standard over traditional grounds for civil commitment" (Friedland, 1999, p. 124). More specifically, concerns arise that such cases could transform the traditional treatment orientation of civil commitment statutes into a mechanism for the continuation of criminal sanctions after an individual has served his or her prison sentence.

A THIN LINE: CIVIL COMMITMENT VERSUS CRIMINAL INCARCERATION

Friedland (1999) thoroughly explained the distinguishing characteristics of civil commitment and criminal incarceration. He stated that, although criminal incarceration may have the goal of rehabilitation in mind, its primary objective is to provide punishment and deterrence. This aim stands in contrast to a civil commitments' goal, which has the primary objective of helping the detainee with treatment while still protecting the rest of society from harm. Often, the burden of proof in civil commitment cases is clear and

convincing evidence, whereas criminal cases retain the more stringent burden of proof beyond a reasonable doubt (Friedland, 1999). Additionally, a petitioner in a civil commitment case is required to show that the respondent suffers from a serious mental illness, whereas the petitioner in a criminal case is required to provide "proof of a particular mental state or scienter" (Friedland, 1999, p. 87). Therefore, although there are distinct differences between civil commitment and criminal incarceration, it is clear that these distinctions are fragile and can easily be erased.

A REVIEW OF RECENT SEX OFFENDER LEGISLATION

In 1994, the Kansas legislature enacted the KSVPA. This act sets forth procedures for the civil commitment of individuals who have been diagnosed as suffering from "mental abnormalities" or "personality disorders" that make the individual likely to engage in "predatory acts of sexual violence" (Kansas Statue Annotated, 2000, §59-29a02[a], [b]). The SVP legislation is the most recent in a series of legislative enactments addressing sexual offenders. The following subsections address three of the most widely used forms of legislation including SVP legislation.

MEGAN'S LAW

One of the most notable and controversial issues surrounding the treatment and governance of sexual offenders in the past 3 decades is Megan's Law. It was enacted in 1994 and resulted from the assault and murder of a New Jersey girl whose attacker was a convicted sex offender who lived in close proximity to her home (Kappeler, Blumberg, & Potter, 2000; Van Duyn, 1999). This law requires that sex offenders who have been determined to be potential repeat offenders register with local authorities. Additionally, some states have enacted guidelines for the subsequent notification of the community in which the offender resides (Arnone, 2000; Kappeler et al., 2000). Despite its arguable threat to due process, autonomy for double jeopardy, and ex post facto punishment, these laws were found to be constitutional in 1995 by the New Jersey Supreme Court in the case of *Doe v. Poritz* (1995). Although the definition of who is considered a sex offender varies from state to state, as does the scope of who should be notified of the offender's presence in the community, all 50 states have adopted some form of legislation that requires the registration of sex offenders in the jurisdiction in which the offender lives (Arnone, 2000; Kappeler et al., 2000).

This form of legislation has created difficulty for officials seeking to "place offenders in communities without the communities driving them out" (Van Duyn, 1999, p. 635). Whether it is a New Jersey man fleeing his home due to Guardian Angel harassment, a Washington man having his home burned down, or the firebombing of a man's car in California (Van Duyn, 1999), Megan's Law has clearly damaged the ability of anyone labeled as a sex offender of attaining the expectation of privacy and safety with their community.

CHEMICAL CASTRATION

Whereas the aforementioned legislation intrudes on an offender's privacy upon release from prison, a more physically intrusive technique can be found in several states that have legalized the practice of chemical castration of repeat and in some cases one-time rapists (Smith, 1998/1999). This process, first adopted by the State of California on January 1, 1997, was soon adopted by other states such as Florida, Michigan, Massachusetts, Missouri, Texas, Washington, and New York (Smith, 1998/1999). Generally, as part of their conditions of release, offenders are ordered to receive injections of Depo-Provera, a testosterone-reducing drug. Many argue that utilizing a medical treatment such as this as a form of criminal punishment is dangerous, to say the least. Opponents have two primary arguments against such legislation. First, legislatures lack the expertise needed to design and enact such forms of legislation given the complexities surrounding abnormalities such a pedophilia. Second, such treatments arguably violate the Eighth Amendment protection against cruel and unusual punishment; the First Amendment right to "generate, communicate and receive ideas," as is protected under the concept of free expression, and the Fourteenth Amendment right to determine what will be done to one's own body (Smith, 1998/1999, p. 27).

Although the applicability of both the Eighth and Fourteenth Amendments to such legislation is straightforward, it is recognized that the application of the First Amendment right to "generate, communicate and receive ideas" is not as intuitively obvious. In her discussion of this issue and the case of *Stanley v. Georgia* (1969), Smith (1998/1999) emphasized that not only did the Supreme Court affirm an "individual's right to be free from government intrusion of his or her thought" but that various courts have utilized this decision to protect "mental patients from invasive procedures impacting their First Amendment freedom of thought" (p. 170; see also *Kaimowitz v. Department of Mental Health*, 1973; *Rogers v. Okin*, 1979). However, she also noted that not all such intrusions are prohibited. For example, in the case of *Rennie v. Klein* (1978), the court allowed the state to forcibly treat patients

with psychotropic drugs. This decision contradicted the finding in *Okin* that had denied the right of state-run hospitals to forcibly medicate patients with psychotropic drugs that affected a patients' ability to think. The court found in *Rennie* (1978) that "if the intrusion is minor and the state's reason for the intrusion is compelling, it may be justified under the First Amendment" (Smith, 1998/1999, p. 171). Therefore, the question that arises in cases of chemical castration is how intrusive is Depo-Provera on the offenders' thoughts? According to Smith, the intrusion is extensive to include the fact that Depo-Provera has a direct effect on cerebral functions. This being said, it is clear that not only can Eighth and Fourteenth Amendment violations theoretically be applied to such legislation but so can First Amendment violations. As Smith noted, such laws demonstrate the difficulty in combining rigid and formalistic laws with complex medical treatments.

SVP LAWS

As previously mentioned, SVP laws are for all intents and purposes revised versions of the old sexual psychopath laws, which started appearing in 1990. Morris (2000) stated that it was the State of Washington that enacted the first SVP legislation only 6 years after doing away with its sexual psychopath commitment statute. He went on to point out that the sexual psychopath legislation was discredited when mental health professionals were unable "to identify a specific mental disorder experienced by individuals who should be included within the targeted group and the lack of successful treatment methodologies to improve their condition" (Morris, 2000, p. 1200). In 1990, Washington legislatures enacted the SVP legislation and by doing so, reestablished indeterminate commitment of dangerous sexual offenders. "But unlike its sexual psychopath predecessor, which substituted indeterminate treatment for determinate punishment, the SVP statutes added indeterminate confinement upon completion of the offender's criminal sentence" (Morris, 2000, p. 1201). However, it was not until the case of *Kansas v. Hendricks* (1997) that the U.S. Supreme Court heard arguments focusing on this newest form of civil commitment legislation. The Court found that the KSVPA meets the due process requirements of the Constitution and that the act conforms to double jeopardy principles and does not constitute ex post facto lawmaking. Because of the relatively short history of SVP legislation and the fact that the U.S. Supreme Court has only reviewed one state's SVP legislation, it is more instructive to turn to the court's previous views regarding civil commitment of sex offenders and civil commitment in general.

In *Minnesota ex rel. Pearson v. Probate Court* (1940), the Court upheld the Minnesota statute by rejecting arguments of equal protection and vague-

ness. The Court stated that "some classes of people were more likely to be dangerous to the public than others and consequently could be treated differently as a group" (Friedland, 1999, p. 88). Friedland (1999) explained that the Court's response to the vagueness challenge was that "the requirements of the law were not unconstitutionally vague because they were administrable and subject to proof just like the elements of any crime prescribed by legislation" (p. 89). Future cases, however, found the court paying increasingly more attention to the absence of due process safeguards in involuntary commitment cases. For instance, when a New York civil commitment law was brought before the Court in *Baxstrom v. Herold* (1966), the Court struck down the said law, which permitted the involuntary commitment of offenders upon completion of their prison sentence without a jury reviewing the case.

Since the 1970s, the topic of civil commitment has been the subject of numerous landmark cases decided by the U.S. Supreme Court. In *O'Connor v. Donaldson* (1975), the Court held that

> a finding of "mental illness" alone cannot justify a State's locking a person up against his will and keeping him indefinitely in simple custodial confinement. . . . Moreover . . . mere public intolerance or animosity cannot constitutionally justify the deprivation of a person's physical liberty. (Spierling, 2001, p. 888)

Spierling (2001), in her analysis of the Washington Violent Sexual Predator Law, added that

> The Supreme Court again addressed the limitations of civil commitment in *Foucha v. Louisiana* (1992). The Court was asked to determine whether a person committed to a mental hospital having been found guilty of a criminal charge by reason of insanity can continue to be held there when there had been no finding of mental illness to commit him in the first place. . . . Four years after his commitment, doctors recommended that Foucha be released, as there was no evidence that he had ever suffered from a mental illness. Despite the doctors' recommendation, Foucha was not released, but instead ordered to remain confined, with the Supreme Court of Louisiana holding that he had not "carried the burden placed upon him by statute to prove that he was not dangerous . . . and that neither the Due Process Clause nor the Equal Protection Clause was violated by the statutory provision permitting confinement of an insanity acquittee based on dangerousness alone. (p. 889)

Consequently, the Supreme Court held that, to be confined involuntarily, a person must be found, through clear and convincing evidence, to pose a danger to self or others due to suffering from a mental illness. These holdings

remained relatively unquestioned until the recent enactment of SVP legislation.

As stated earlier, the KSVPA has been the topic of debate before the U.S. Supreme Court on two different occasions within a 5-year period. The act first surfaced in Court in 1997 in the case of *Kansas v. Hendricks* (1997) at which time two questions were addressed. First, does the act's "definition of mental abnormality satisfy the substantive due process requirements of an involuntary civil commitment" (Del Carmen, Ritter, & Witt, 2002, p. 259)? Second, does the act violate the double jeopardy prohibition or the ban on ex post facto lawmaking covered in the U.S. Constitution (Del Carmen et al., 2002)?

Through the KSVPA, the state sought to commit the 62-year-old Hendricks upon his release from prison. This was based on Hendricks's extensive history of molesting children. When Hendricks contested the act's constitutionality, the state court granted him a jury trial. The jury subsequently concluded that Hendricks was an SVP and ordered Hendricks committed under the KSVPA. Upon appeal to the state supreme court, the act was invalidated "on the grounds that the precommitment condition of mental abnormality did not satisfy the substantive due process requirement that involuntary civil commitment be based on a mental illness finding" (*Kansas v. Hendricks*, 1997, p. 10). However, on a writ of certiorari, the U.S. Supreme Court reversed the decision, stating,

> We hold that the Kansas Sexually Violent Predator Act comports with due process requirements and neither runs afoul of double jeopardy principles nor constitutes an exercise in impermissible *ex post-facto* lawmaking. Accordingly, the judgment of the Kansas Supreme Court is reversed. (*Kansas v. Hendricks*, 1997, p. 10)

Then, in 2001, the Court found itself clarifying its stance on SVP legislation in yet another case emanating from the state of Kansas—*Kansas v. Crane* (2002).

KANSAS V. CRANE

FACTS AND ISSUES

In 2001, the issue of the KSVPA was brought before the Court for a second time in the case of *Kansas v. Crane* (2002). The defendant, Crane, had exposed himself to a tanning salon attendant and 30 minutes later entered a

video store where he waited until he was the only customer present and then exposed himself to the clerk. He "grabbed the clerk by the neck, demanded she perform oral sex on him, and threatened to rape her, before running out of the store" (*Kansas v. Crane*, 2002, p. 864). Crane, who had been convicted of lewd and lascivious behavior and pleaded guilty to aggravated sexual battery for the two aforementioned offenses, was now facing possible civil commitment under the KSVPA in state district court. He was evaluated by several psychologists who diagnosed him as suffering from exhibitionism and antisocial personality disorder, but they ultimately held that his mental disorder did not impair his volitional control to the degree that he could not control his dangerous behavior (*Kansas v. Crane*, 2002, p. 865). The Kansas District Court ordered Crane to be civilly committed, but this decision was reversed by the Kansas State Supreme Court, which once again found their decision before the U.S. Supreme Court.

In the case of *Hendricks* (1997), the question before the U.S. Supreme Court was that of the KSVPA's compliance with the substantive due process requirements of an involuntary civil commitment as well as with the double jeopardy prohibition and the ban on ex post facto lawmaking covered in the U.S. Constitution. In *Crane* (2002), the Kansas Supreme Court's view was that, according to the U.S. Supreme Court's interpretation of the federal Constitution in the *Hendricks* case, a state is always required to "prove that a dangerous individual is completely unable to control his behavior . . . even if (as provided by Kansas law) problems of emotional, and not volitional, capacity prove the source of behavior warranting commitment" (*Kansas v. Crane*, 2002, p. 861).

U.S. SUPREME COURT DECISION

THE MAJORITY OPINION

In a 7-to-2 decision with Justices Scalia and Thomas dissenting, the U.S. Supreme Court vacated and remanded the *Crane* (2002) case back to the lower court. The majority noted that, contrary to the Kansas Supreme Court's interpretation of the Court's decision in *Hendricks* (1997), the Court had not set a requirement of total or complete lack of control. Instead, it had relied on the SVPA's requirement of a "mental abnormality" or "personality disorder" that would make it "difficult, if not impossible, for the individual to control his dangerous behavior" (*Kansas v. Hendricks*, 1997, p. 358). The key to this finding is the interpretation of the term *difficult*. The Court stressed that its interpretation of the term *difficult* does not translate to an absolute loss of

control of one's behavior. Additionally, the Court stated that "most severely ill people—even those commonly termed 'psychopaths'—retain some ability to control their behavior" (*Kansas v. Crane*, 2002, p. 862). To set an absolute standard such as this would restrict a large portion of civil commitment attempts of truly dangerous individuals suffering from severe mental abnormalities.

The Court disagreed, however, with Kansas's claim that the Constitution does not require any lack of control determination when seeking to commit dangerous sexual offenders like Hendricks. It stressed the fact that the *Hendricks* (1997) case "underscored the constitutional importance of distinguishing a dangerous sexual offender" (*Kansas v. Crane*, 2002, p. 870) from other dangerous offenders who are not to be subject to civil commitment.

In response to the state's concern about the frequency in which volitional problems are the root cause of an offender's serious mental abnormality or disorder, the Court maintained that it "did not draw a clear distinction between the purely 'emotional' sexually related mental abnormality and the 'volitional'" (*Kansas v Crane*, 2002, p. 864). The Court stated that, in both the *Hendricks* (1997) and *Crane* (2002) cases, they were not provided the opportunity to contemplate whether "confinement based solely on 'emotional' abnormality would be constitutional" (*Kansas v Crane*, 2002, p. 864).

THE DISSENTING OPINION

In the opening paragraph of the dissenting opinion, Justice Scalia, with whom Justice Thomas joined, presented a scathing review of the majority opinion:

> Today the Court holds that the KSVPA cannot, consistent with so-called substantive due process, be applied as written. It does so even though, less than five years ago, we upheld the very same statute against the very same court. Not only is the new law that the Court announces today wrong, but the Court's manner of promulgating it—snatching back from the State of Kansas a victory so recently awarded—cheapens the currency of our judgment. I would reverse, rather than vacate, the judgment of the Kansas Supreme Court. (*Kansas v Crane*, 2002, p. 872)

Justice Scalia's dissent is based on two primary arguments. First, the Court did not require a separate finding with regard to an offender's inability to control behavior in the *Hendricks* (1997) case. Second, all the statute and Constitution required was that a jury find beyond a reasonable doubt that the offender suffers from antisocial personality disorder and exhibitionism and

that this behavior constituted a mental abnormality or a personality disorder, both of which result in a likelihood that the offender would continue to take part in sexually violent acts.

AN ANALYSIS OF THE DECISIONS

The key to understanding the importance of both the majority and the dissenting opinions lies in distinguishing between the terms *reverse* and *vacate* in the context of this case. The decision to vacate and remand a case, as the majority did in the *Crane* (2002) case, simply means that the Court determined not to address the Kansas Supreme Court's decision and, by remanding it, provided the lower court the opportunity to take further action based on the U.S. Supreme Court's comments. That said, Justice Scalia's statement that he would "reverse rather than vacate" means that he would have made a decision (reversal) regarding the case due to the implications he believed would result from the Supreme Court's ruling to vacate. Specifically, he saw the Court's decision to vacate as undermining the Court's judgment, narrowing the scope of the SVPA, and instilling confusion with regard to what the courts should charge the juries with in SVPA cases.

The majority stressed that it is imperative to insure a distinction between dangerous sexual offenders and other violent offenders who are not to be civilly committed and that failure to do so could erase the distinction between criminal law and civil commitment. In other words, such an erasure could result in the perversion of civil commitment as a rehabilitative mechanism to a tool for retribution or deterrence. As stated in *Foucha* (1992), the Court decided similarly by refusing to support an "approach to civil commitment that would permit the indefinite confinement of any convicted criminal after completion of a prison term" (*Kansas v. Crane*, 2002, p. 863). Nevertheless, the Court also admitted to its intentional failure in providing a narrow or technical meaning to the phrase *lack of control*. This intentional ambiguity is justified in the Court's statement that

> The Constitution's safeguards of human liberty in the area of mental illness and the law are not always best enforced through precise bright-line rules.—Consequently, we have sought to provide constitutional guidance in this area by proceeding deliberately and contextually, elaborating generally stated constitutional standards and objectives, as specific circumstances required. (*Kansas v. Crane*, 2002, p. 863)

The dissenting opinion distanced itself from the majority with regards to the majority's reliance on the necessity to establish a separate finding of

inability to control behavior. According to Justice Scalia, the majority's desire to establish such separate findings is not necessary because the Court in the *Kansas v. Hendricks* (1997) case stated that 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. (p. 358)

This established the standard that the presence of mental abnormality or personality disorders that result in a likelihood of repeat sexual violence would be used to prove the difficulty or impossibility of control. Justice Scalia went on to point out that the jury in the *Hendricks* case never made a separate finding of "difficulty, if not impossibility, to control behavior" (*Kansas v. Crane*, 2002, p. 867). Rather, Scalia wrote that this conclusion was encompassed in the finding of an abnormality, which could lead to future dangerousness.

Justice Scalia showed disgust with what he perceived as the Court's reopening a question he interpreted as being closed by *Hendricks* (1997). The question is whether the SVPA can be applied because it allows the civil commitment of those who suffer from mental illnesses other than that of volitional impairments. He viewed the Court's decision to vacate and remand *Crane* (2002) as a statement by the Court that the holding in the *Hendricks* case only covers the application of the SPVA in cases where volitional impairment is at issue. He argued that

> The narrowest holding of Hendricks affirmed the constitutionality of commitment on the basis of the jury charge given in that case (to wit, the language of the SVPA); and since that charge did not require a finding of volitional impairment, neither does the Constitution. (*Kansas v. Crane*, 2002, p. 868)

This, in essence, reduces the *Hendricks* case from one that represents the Supreme Court's determination that the SPVA and its language were completely constitutional to a case that only justifies the application of the SPVA in cases that address volitional impairments.

As the dissenting opinion illustrates, a jury, following the Court's holding in *Hendricks* (1997), is charged with finding beyond a reasonable doubt that the defendant, having been convicted of one of the enumerated sexual offenses, suffers from a mental abnormality or personality disorder. The jury is additionally charged with determining if the condition renders the defendant likely to commit future acts of sexual violence. The two dissenting justices maintained that, with the Court's opinion in the *Crane* (2002) case, a

required third finding had been introduced. They said that the jury in an SVPA case was now required to determine that the defendant suffers from an inability to control his or her behavior to "a degree that will vary in light of such features of the case as the nature of the psychiatric diagnosis, and the severity of the mental abnormality itself" (*Kansas v. Crane*, 2002, p. 869). The dissenting justices charged that the Court exhibited irresponsible behavior, because it left the law ambiguous concerning how courts should charge juries in future SVPA cases.

In the final paragraph of the dissenting opinion, Justice Scalia wrote,

> A jury determined beyond a reasonable doubt that the respondent suffers from antisocial personality disorder combined with exhibitionism, and that this is either a mental abnormality or a personality disorder making it likely he will commit repeat acts of sexual violence. That is all the SVPA requires, and all the Constitution demands. Since we have already held precisely that in another case (which, by a remarkable feat of jurisprudential jujitsu the Court relies upon and the only authority for its decision), I would reverse the judgment below. (*Kansas v. Crane*, 2002, p. 870)

Clearly, the ambiguity of the majority's decision will lead to future confusion, not only in the state of Kansas but also in other states that attempt to utilize similar forms of legislation. Justice Scalia's arguments and obvious disgust with the majority's decision is well argued, as is his reliance on the precommitment requirements established in the SVPA (mental abnormality or personality disorder) and their consistency with other such statutes. However, the more finite requirements that the majority decision points to will be beneficial in the long run. The apparent amplification of *Hendricks* (1997), by way of vacating and remanding *Crane* (2002), most likely will result in the fulfillment of Justice Scalia's fears of degrees of determination—degrees that will vary with the nature of the psychiatric diagnosis and the severity of the mental abnormality itself). Additionally, courts will be strained to interpret what juries are to be instructed to consider in determinations of civil commitment. Such variations are needed to protect the rights of all individuals.

CONCLUSION

When examining the possible impact of civil commitment statutes such as the KSVPA, a fine line between civil and criminal sanctions is observed. The fact that the apparent intent is civil in nature does not mean that the subsequent repercussions do not result in what can be deemed further criminal sanctions. Courts have the task of insuring due process and avoiding the

effects of sometimes-vengeful American society. This can include everyone from the average citizen to prosecutors, judges, and psychiatrists—individuals who can play a significant role in determining whether a defendant should be civilly committed under the SPVA.

Central to the concept and purpose of civil commitment is the presumed intent of therapy. Horwitz (1990) stated that "when some sort of damage is perceived to result from disordered personalities rather than from deliberate rule breaking, accident, or negligence, therapy is a likely response" (p. 80). He emphasized that "when observers cannot fathom why persons engage in actions that seem to have no rational basis such as exhibitionism, child molestation, or kleptomania, they often regard therapy as an appropriate response" (Horwitz, 1990, p. 80). However, when the social distance between those who apply the label of *deviant* and those who are labeled increases, so does the implementation of penal rather than therapeutic sanctions. For example, the closer or more intimate a family member is to the subject, the more sympathetic he or she will be, whereas the more distant they are, the more likely they are to respond negatively. As a result, the 19th century saw mental hospitals move from therapeutic to custodial duties because of the increased population of foreign-born and culturally distant individuals (Horwitz, 1990).

Given this apparent distancing effect, one can argue that those diagnosed with mental disorders are seen by both the public and their keepers as other or distant caricatures removed from close personal experience; therefore, they are less likely to receive therapeutic treatment when civilly committed. Speaking in regard to the KSVPA, Kimberly A. Dorsett (1998) stated, "This law reflects confusing thinking. . . . They make today's mental health providers and psychiatric hospitals into tomorrow's wardens and jails" (p. 113). Granted, this is speculation, but the speculation is strengthened through observations of what the media and other claims makers have established to be modern-day versions of Stanley Cohen's (1980) *folk devils*. As Websdale (1999) suggested, "Moral panics serve as a form of social control since they produce an overreaction on the part of authorities and ultimately some kind of crackdown" (p. 98). The construction of the dangerous SVP can be seen as a modern-day folk devil. Ironically, long before Cohen's discussion of folk devils,

> Edward Sutherland (1950) argued that the emergence of 'sexual psychopathy laws' from the late 1930's was heavily influenced by the media and psychiatric community. . . . For Sutherland, the sexual psychopathy laws represented a shift from punishment to medical treatment of sex offenders. (Websdale, 1996, p. 91)

Now with the distancing of public officials, health care workers, and society in general, one sees the potential for a melding of punishment and medical treatment (therapy) into one entity.

John F. Kennedy once said, "We enjoy the luxury of opinion without the difficulty of thought" (Kappeler, Sluder, & Alpert, 1998, p. 2). Although most people in America today are somewhat aware of the harshness of prison life and the trauma one can endure while in prison, there are those who are not aware but yet still exercise their luxury of opinion about who deserves specific services such as treatment, prison, or civil commitment. It is at this juncture that the true danger lurks, that point in time when those who are the most distant from the subject voice opinions without embarking on the difficult task of formulating informed thought. But if one does engage in an objective analysis with an understanding of the realities of prison life, then one must also recognize that with great trauma comes long-term issues or mental abnormalities that can call for treatment after incarceration. The Court stated in *Hendricks* (1997) that

> Those persons committed under the Act, are, by definition, suffering from a "mental abnormality" or a "personality disorder" that prevents them from exercising adequate control over behavior. Such persons are therefore unlikely to be deterred by the threat of confinement. (pp. 362-363)

If one allows oneself to be burdened with informed thought, the question must arise as to what purpose it serves to incarcerate the individual initially and then seek to treat the individual for his or her mental abnormality or personality disorder through civil commitment. Such actions only fulfill an underlying desire to punish, even if they are cloaked behind the auspices of protecting the public or the defendant. As previously mentioned in *O'Connor v. Donaldson* (1975), the Court sought to protect the individual from public intolerance or animosity by holding that they could not constitutionally justify the deprivation of a person's physical liberty. It is this author's contention that the members of the U.S. Supreme Court are quite aware of this constraint and that this awareness ultimately resulted in the determination to vacate rather than reverse the Kansas Supreme Court in *Crane* (2002). By vacating, the Court was allowed to stress the necessity of more strict criteria rather than imposing the simple formula, prior conviction + mental abnormality = dangerousness. It has also let the lower courts know that there will be no quick filtering standards when it comes to civil confinement, particularly when the individual has already endured prison time. Too easily can legislation be molded to fit the misguided opinions of the many while ignoring the basic rights and needs of the few. In the *Hendricks* (1997) case, Justice

Thomas "threw the door wide open to creative interpretation of commitment laws by giving his approval to the standards of 'mental abnormality' and 'personality disorder'" (Friedland, 1999, p. 31). The *Diagnostic and Statistical Manual of Mental Disorders, 4th edition* (*DSM-IV*; American Psychiatric Association, 1994) has no strict parameters of mental abnormality, and in general, abnormality is "defined as the deviation from the average population coupled with maladaptation" (Friedland, 1999, p. 31). Therefore, the definitions of abnormalities are much too pliable to be used in standards that determine the need for civil commitment (Friedland, 1999). That said, the Supreme Court decision in *Crane* was needed, but it represents an arguably rare occasion in which the individual rights of a minority group of offenders who are detested by society are upheld. If the true intention of such forms of legislation is to isolate these individuals from the general public while providing them with therapy so that they may ultimately become productive members of the general society, then perhaps either a thicker line should be established or the complete removal of the line alltogether. By a thicker line, this author is suggesting that such legislation be held to stricter definitions of what constitutes an abnormality than that provided by the *DSM-IV*. Once again, if the legislative bodies passing SVP legislation are truly concerned with both the safety of the public and the recovery of the individual, then the complete removal of the line by providing a jury or judge with the option of prison or civil commitment could solve some of the problems presented by SVP legislation. This being said, no matter what the outcome, a watchful eye must be cast on this form of legislation in the future, both by the U.S. Supreme Court and by all those who seek to surpass personal opinions and engage in informed, objective thought.

REFERENCES

American Psychiatric Association. (1994). *Diagnostic and statistical manual of mental disorders* (4th ed.). Washington, DC: Author.

Arnone, K. L. (2000). Megan's Law and habeas corpus review: Lifetime duty with no possibility of relief? *Arizona Law Review*, *42*, 157-182.

Baxstrom v. Herold, 383 U.S. 107 (1966).

Cohen, S. (1980). *Folk devils and moral panics* (2nd ed.). New York: St. Martin's.

Del Carmen, R. V., Ritter, S. E., & Witt, B. A. (2002). *Briefs of leading cases in corrections* (3rd ed.). Cincinnati, OH: Anderson.

Doe v. Poritz, 516 U.S. 986 (1995).

Dorsett, K. A. (1998). Kansas v. Hendricks: Marking the beginning of a dangerous new era in civil commitment. *DePaul Law Review*, *48*, 113-159.

Foucha v. Louisiana, 504 U.S. 71 (1992).

Friedland, S. I. (1999). On treatment, punishment, and the civil commitment of sex offenders. *Colorado Law Review*, *70*, 73-154.
Horwitz, A. V. (1990). *The logic of social control*. New York: Plenum.
Kaimowitz v. Dept. of Mental Health, Civ. No. 73019434 (Cir. Ct. Wayne County, MI, July 10, 1973).
Kansas Statute Annotated §59-29a02 (2000).
Kansas v. Crane, 534 U.S. 407 (2002).
Kansas v. Hendricks, 521 U.S. 346 (1997).
Kappeler, V. E., Blumberg, M., & Potter, G. W. (2000). *The mythology of crime and criminal justice*. Prospect Heights, IL: Waveland.
Kappeler, V. E., Sluder, R. D., & Alpert, G. P. (1998). *Forces of deviance: Understanding the dark side of policing*. Prospect Heights, IL: Waveland.
La Fond, J. (1999). Therapeutic jurisprudence: Can therapeutic jurisprudence be normatively neutral? Sexual predator laws: Their impact on participants and policy. *Arizona Law Review*, *41*, 375-419.
Minnesota ex rel. Pearson v. Probate Court of Ramsey County, 309 U.S. 270 (1940).
Morris, G. H. (2000). The evil that men do: Perverting justice to punish perverts. *University of Illinois Law Review*, *2000*(4), 1199-1231.
O'Connor v. Donaldson, 422 U.S. 563 (1975).
Potter, G. W., & Kappeler, V. E. (1998). *Constructing crime: Perspectives on making news and social problems*. Prospect Heights, IL: Waveland.
Rennie v. Klein, 462 F. Supp. 1131, 1143-44 (D. N.J. 1978).
Rogers v. Okin, 478 F. Supp. 1342 (MA Dist. Ct. 1979).
Smith, K. L. (1988/1999). Making pedophiles take their medicine: California's chemical castration law. *The Buffalo Public Interest Law Journal*, *17*, 123-175.
Spierling, S. E. (2001). Lock them up and throw away the key: How Washington's violent sexual predator law will shape the future balance between punishment and prevention. *Journal of Law and Policy*, *9*, 879-915.
Stanley v. Georgia, 394 U.S. 557 (1969).
Sutherland, E. (1950). The diffusion of sexual psychopath laws. *American Journal of Sociology*, *56*, 142-148.
Van Duyn, A. L. (1999). The scarlet letter branding: A constitutional analysis of community notification provisions in sex offender statues. *Drake Law Review*, *47*, 635-659.
Websdale, N. (1996). Predators: The social construction of "stranger danger" in Washington State as a form of patriarchal ideology. In J. Ferrell & N. Websdale (Eds.), *Making trouble: Cultural construction of crime, deviance, and control* (pp. 91-114). New York: Aldine De Gruyter.

Frank Wilson is a graduate student at Sam Houston State University.