CIVIL COMMITMENT OF SEXUALLY VIOLENT PREDATORS: THE SEARCH FOR A LIMITING PRINCIPLE

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INTRODUCTION

Sexually violent predator statutes are the most recent manifestation of an enduring effort to combat the problems of sexual violence and crime. While the modern laws are of relatively recent vintage, the first generation of sex offender commitment laws can be traced back to the 1930s. These "sexual psychopath" laws authorized the involuntary commitment of those charged with, or convicted of, sex offenses, and found to be mentally disordered or dangerous, and consigned them to psychiatric institutions (or, in some cases, to prison) for treatment. They were intended to divert sex offenders from the criminal justice system to the mental health system, and were representative of the prevailing therapeutic optimism of the time. By 1960, more than half of the states passed some kind of sexual psychopath law. In the 1970s, however, the collapse of the rehabilitative ideal, the shift towards determinate sentencing, and the rights revolution in criminal and mental health law paved the way for the decline of sexual psychopath laws.

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1 Michigan was the first state to enact a sexual psychopath law in 1937. For a detailed review of the origins of the first generation of sexual psychopath laws, 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 (1995).

2 Twenty six states and the District of Columbia had such laws by 1960. These laws were in addition to ordinary procedures for civil commitment of the mentally ill. Id. at 903.

3 For a discussion of the forensic-clinical model of dangerousness and how it eventually gave way to the justice model, which in turn was replaced by the community protection model, see generally Michael Petrunik, The Hare and the Tortoise: Dangerousness and Sex Offender Policy in the United States and Canada, 45 CANADIAN J. OF CRIMINOLOGY & CRIM. J. 43, 45-48 (Jan. 2003).
Interestingly, while the shift to determinate sentencing was to some extent responsible for the demise of the first generation of sex offender commitment laws, it was also largely responsible for the birth of the next generation. The contemporary Western tenet that the state should be obliged to protect its citizens, coupled with an instinct of public punitiveness in the 1980s, have resulted in the principle of incapacitation moving slowly to the center-stage of the American criminal justice landscape.4 Many states adopted determinate sentencing schemes and presumptive sentencing guidelines, which fixed the punishment for sexually violent offenders and removed the flexibility of incarcerating sex offenders until they were no longer considered dangerous5 (which, very often, was never). Simultaneously, feminist-inspired views of sexual violence began to reshape judgments about the appropriate punishment for sex offenders.6 Sentences under the new schemes were viewed as drastically insufficient for violent, recidivist sex offenders. This resulted in an “incapacitation gap”7 which somehow needed to be filled. Constitutional constraints prevented states from retroactively increasing sentences, and a rhetorical commitment to the principle of desert precluded a return to indeterminate sentences.8 These constraints on the criminal law led states to resort to civil commitment for sexually violent predators. Unlike earlier laws—which provided for treatment in lieu of punishment—sexually violent predator statutes provided for post-incarceration civil commitment.

4 Janus discusses this development and refers to the notion of “zero risk to public safety.” He cites Zimring and Hawkins on the point that the principle of incapacitation has no internal point of balance—by its internal logic, it tends to be expansive rather than limited. See Eric Janus, Civil Commitment as Social Control: Managing the Risk of Sexual Violence, in DANGEROUS OFFENDERS: PUNISHMENT AND SOCIAL ORDER 74, 74-75 (Mark Brown & John Pratt eds., 2000) [hereinafter Janus, Civil Commitment]; see also F.E. ZIMRING & G. HAWKINS, INCAPACITATION: PENAL CONFINEMENT AND THE RESTRAINT OF CRIME 10-16 (1995), cited in Janus, Civil Commitment, supra note 4, at 75.

5 For example, Minnesota shifted to a system of determinate sentencing in 1980. See John Kirwin, Examining our Approaches to Sex Offenders and the Law: One Arrow in the Quiver—Using Civil Commitment as One Component of the State's Response to Sexual Violence, 29 WM. MITCHELL L. REV. 1135, 1140 (2003). Prior to that, judges generally imposed lengthy sentences, but parole boards made the operational determination of how much time a person would actually spend in prison. Id. Dangerous offenders could therefore be detained for long periods. Id. The shift to determinate sentencing resulted in individuals being entitled to release at certain dates (such as upon completion of two thirds of their sentence), and the decision to release an offender was therefore no longer based on the potential to reoffend. Id.

6 Janus, Civil Commitment, supra note 4, at 74.

7 Id.

8 Id. at 74.
The hybrid nature of civil commitment laws is not solely the result of hurried political expediency, however. It is also reflective of a particular legal and intellectual culture that formed the necessary breeding ground for such a development. An analysis of sex offender commitment laws is most appropriately made against the backdrop of two important trends in criminal justice in America: the blurring of the civil-criminal distinction, and the rise of actuarialism (i.e., actuarial justice) and risk assessment. While the civil-criminal distinction has always escaped definition, its conceptual foundations came under strong attack in the last few decades of the twentieth century. The collapse of the civil-criminal distinction has been fueled by the predominance of the economic analysis of the law, and developments in cognitive and behavioral sciences.9 The economic analysis of law unifies the purpose of both civil and criminal law as being the achievement of optimal deterrence, thus bringing to the forefront the issue of social control and protection. At the same time, developments in cognitive and behavioral sciences led to an increased skepticism about the root causes of deviance and the effectiveness of different forms of treatment. As a result, the goal of incapacitation replaced rehabilitation as the primary purpose of intervention. Thus, the blurring of the civil-criminal distinction brought about a reconfiguration of the modern penal system in a manner in which dangerousness laws occupy a far more central place than previously. With social protection and incapacitation of the dangerous firmly established as legitimate goals of the modern criminal justice system, actuarialism—risk assessment based on statistical probability—became the new method of identifying the dangerous. Actuarial justice10 facilitates and represents a shift of the object of criminal justice from the individual

9 For a detailed account of how these two intellectual developments contributed to the collapse of the civil-criminal distinction, see Carol Steiker, *Punishment and Procedure: Punishment Theory and the Criminal-Civil Procedural Divide*, 85 GEO. L.J. 775, 784-91 (1997).

10 Feeley and Simon first drew attention to the emerging phenomenon of actuarial justice in the early 1990s. Interestingly, the intellectual developments that fueled the collapse of the civil-criminal distinction have also created a conducive environment for the rise of actuarial justice. This form of justice is grounded in social utility analysis, and is heavily influenced by the law and economics movement. The management of risk has superseded morality and individual responsibility in legal discourse. See Malcom Feeley & Jonathan Simon, *Actuarial Justice: The Emerging New Criminal Law*, in *FUTURES OF CRIMINOLOGY* 173 (David Nelken ed., 1994). O’Malley connects the rise of actuarial justice with the “triumph of probability over determinism in science,” and also with attacks on the welfare state. See Pat O’Malley, *Risk Societies and the Government of Crime*, in *DANGEROUS OFFENDERS: PUNISHMENT AND SOCIAL ORDER* 17 (Mark Brown & John Pratt eds., 2000).
offender to aggregate groups of offenders, and thus, is in discord with our traditional notions of justice.

While the notion of selective incapacitation of the dangerous became essentially mainstream, legislatures and courts consistently rejected the pure jurisprudence of preventive detention in the domain of civil commitment—a simple calculus that weighs the benefit from the avoidance of harm that would be caused by a potential sex offender against the harm to that individual’s liberty in the event he is detained. Rather, courts and legislatures constantly searched for principled limits to this bipolar calculus. This article examines the range of limiting principles that courts and legislatures sought to superimpose on the bipolar calculus that forms the basis of incapacitation of sexually violent predators.

In the earlier generation of sex offender commitment laws, civil commitment for sex offenders was analogized to commitment of the mentally ill. Traditionally, civil commitment of the mentally ill was predicated on two different rationales: parens patriae power and police power. Under the parens patriae rationale—which represents the role of state as parent (literal translation being “parent of the country”)—the state may civilly commit those who are unable to take care of themselves. Such commitment is for the individual’s own good. Under the police power rationale, the state may commit individuals who are mentally ill and who—as a consequence of such illness—are a danger to the community. While these are two separate justifications, they tend to become fused in the context of civil commitment of the mentally ill. Statutes and courts often apply the two rationales jointly, such that while police power may be invoked as a rationale, it may only be so invoked for those individuals for whom there also exists a parens patriae rationale. This was a comfortable arrangement that allowed courts to


12 Gottlieb cites the Kansas statute as an example of this tendency. David Gottlieb, *Preventive Detention of Sex Offenders*, 50 U. KAN. L. REV. 1031, 1036 (2002) (citing KAN. STAT. ANN. § 59-2902(h)(1)-(3) (1994 & Supp. 2001)). The statute provides that for a person to be committed, he must suffer from a “severe mental disorder to the extent that such person is in need of treatment; [must lack] capacity to make an informed decision concerning treatment; and [must be] likely to cause harm to self and others.” *Id.* For a detailed discussion of the police powers and parens patriae powers of the state as the basis for civil commitment, see *id.* at 1035-36.
Sexually violent predator statutes pose a significant challenge to this arrangement. While there is some variation in the laws of different states, sexually violent predator statutes generally apply to those individuals who possess a “mental abnormality or personality disorder which makes the person likely to engage in repeat acts of sexual violence.”

By explicitly embracing a wider “mental abnormality or personality disorder” standard, these statutes come closer to letting loose the bipolar calculus. If we accept the commitment of sexually violent predators as being civil in nature, is there an effective limiting principle for such commitment?

This article begins with a discussion of civil commitment laws as being rooted in the mental health system, and examines early decisions in which courts held that a finding of “mental illness” was a constitutional prerequisite for civil commitment. It then specifically addresses sexually violent predator statutes, and explores three potential limiting principles.

First, it examines the “mental abnormality” or “personality disorder” standard as being a sufficient limiting principle. This article will critically analyze the Supreme Court’s decision in Kansas v. Hendricks, in which the Court held that a finding of mental abnormality or personality disorder satisfied substantive due process. The standard upheld by the Court is vague, over-inclusive and too malleable in the civil commitment context. In discussing this standard, I refer to psychiatric literature on sexual deviance in an attempt to understand the basis for a finding of sexual deviance.

Second, this article looks at the “lack-of-control” standard superimposed on the Kansas sexually violent predator statute in Kansas v. Crane. In addition to a finding of mental abnormality or personality disorder, Crane requires an independent finding that the individual lacked control. However, the article will argue that the impossibility

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13 KAN. STAT. ANN. § 59-29a02(a) (2005).
14 Steiker points out that much more emphasis has been placed on showing such commitments as being criminal in nature, thereby gaining the attendant due process protections, as compared with the relatively neglected issue of what principles limit the state’s exercise of power when it acts through civil means in its preventive capacity. See Carol Steiker, Foreword: The Limits of the Preventive State, 88 J. CRIM. L. & CRIMINOLOGY 771, 773-80 (1998).
and ambiguity of this standard render it ineffective as a limiting principle.

Finally, this article will examine whether recidivism rates for sex offenders are so drastically different from other categories of offenders that civil commitment is justified. Does recidivism among sex offenders display unique characteristics that would render it a sufficient limiting principle in itself? This article will conclude that sex offender recidivism is an insufficient limiting principle.

The notion that sex offenders are a class of offenders with unusually high rates of recidivism is one that has great political and emotional appeal, but little empirical substantiation. Nevertheless, it is undoubtedly the subtext that informs much of the policy-making in this field. Most recent studies indicate that sex offender recidivism is not any higher than recidivism for other categories of offenders. Critics suggest that because the measure of recidivism is reconviction rather than reoffending, estimates of recidivism rates are deceptively low, particularly since under-reporting of sex offenses is well documented. While this seems intuitively correct, the extent to which reconviction is underrepresentative of reoffending is a matter of speculation. Moreover, it is

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17 There is considerable ambiguity surrounding the precise meaning of the term "recidivism." Unfortunately, since this article relies on the use of the term in other studies, this ambiguity is necessarily retained. "Recidivism" is a term used mainly in North American studies. While it is often used interchangeably with "reconviction," the meaning of the term is broader—it refers to any tendency to relapse into a previous condition or mode of behavior. However, in empirical literature, the term "recidivism" is rarely used in this broader sense. Rather, it is used in conjunction with a range of different outcome measures such as arrest, charge, reconviction, etc. For a description of the various uses of "recidivism" and an analysis of how the outcome measure can influence recidivism rates, see Louise Falshaw et al., Assessing Reconviction, Reoffending, and Recidivism in a Sample of UK Sex Offenders, 8 LEGAL & CRIMINOLOGICAL PSYCHOL. 207 (2003).

18 Empirical studies on sex offender recidivism have generated a range of results. See Joelle Anne Moreno, "Whoever Fights Monsters Should See to It that in the Process He Does Not Become a Monster": Hunting the Sexual Predator with Silver Bullets—Federal Rules of Evidence 413-415—and a Stake through the Heart—Kansas v. Hendricks, 49 FLA. L. REV. 505, 554-556 (1997). The variation is often on account of difference in outcome measures and follow-up periods. In the 1990s, there were more consistent results regarding sex offender recidivism, partly on account of the use of meta-analysis techniques. See Richard Hamill, Recidivism of Sex Offenders: What You Need to Know, 15 CRIM. JUST. 24, 24-25 (2001).

19 Also, levels of reoffending are not accurately represented in known levels of reoffending. See A. Nicholas Groth et al., Undetected Recidivism Among Rapists and Child Molesters, 28 CRIME & DELINQ. 450, 453-54 (1982). However, the contrary view is that self-reporting by sex offenders is quite high, and reoffending levels calculated based on self-reporting are not as underrepresentative as they are often made out to be. See Roderic Broadhurst & Nini Loh, The Probabilities of Sex Offender Re-Arrest, 13 CRIM. BEHAV. & MENTAL HEALTH 121, 122 (2003).
now generally accepted that over long periods, reoffending is reflected in reconviction rates. Most studies have confirmed that recidivism rates increase quite considerably with an increase in the follow-up period. However, this article will argue that even slightly higher recidivism rates over very long follow-up periods are insufficient to support civil commitment because they amount to a larger deprivation of the liberty of the sex offender, while the benefit (avoidance of the harm) is constant.

In addition, this article will address the question of predictive accuracy. I argue that, even if actuarial methods enhance the accuracy of predictions, the low base rate of recidivism means that the actual probability of recidivism is significantly lower. Therefore, recidivism rates do not provide an ample justification for the civil commitment of sex offenders. Even if they did, one must consider whether recidivism rates are a limiting principle or simply a differentiating factor. Given the advancement of actuarial techniques, an argument for commitment based on recidivism could easily be extended to many other categories of offenders. Sexually violent predator statutes are characteristic of legislative efforts to deal with dangerous offenders. However, by not entirely breaking free of their “mental illness” moorings, these laws preclude a discussion of the actual limiting principles in operation. Unfortunately, by upholding the constitutionality of the “mental abnormality or personality disorder” requirement, the Supreme Court has also washed its hands of the issue. Nevertheless, it remains an issue at the frontier of the criminal justice system. With the ascendancy of the notion of dangerousness and its consequent impact upon the penal system, we are desperately in need of principled limits that constrain its reach. While these are difficult issues, and I confess to not having conclusive answers, I hope that by attempting a structured analysis of the potential limiting principles, this article will help shape further discussion.

I. Civil Commitment and the Abstract Notion of "Mental Illness"

An understanding of sexual predator statutes is perhaps more meaningful against the backdrop of the civil commitment jurisprudence articulated by the courts. There are two salient features of this jurispru-
ence—one that is relatively uncontroversial and widely recognized and another that is less commented on, but equally important. The relatively unchallenged claim is that, through several opinions, courts in the U.S. have established that mental illness and dangerousness are constitutional predicates for civil commitment. The less commented-upon fact is that in all these opinions, courts have done little to set forth a precise conception of "mental illness." The reason I mention this at the outset is that the emphasis on the former fact without sufficient recognition of the latter has led us to view the Supreme Court's decision in Hendricks as a clear departure from a well established and clearly articulated mental illness standard. While the Court, as I argue later, did embrace a wider standard in Hendricks, the discontent with that decision often leads us to forget that the origins of the mental illness standards are themselves far more obscure than we at times take them to be. A discussion of the long forgotten mental illness standard tends to presume that mental illness is a purely clinical concept. Recognition that mental illness is an integrated legal and clinical concept starkly reveals the barren nature of courts' pronouncements on the mental illness standard.

In this part, I first examine court decisions that address the mental illness requirement for civil commitment, and then attempt to substantively evaluate whether courts have indeed established a mental illness standard. In attempting such an analysis, it is best to view the decisions of the courts in three distinct stages—the decisions preceding Foucha v. Louisiana, Supreme Court's decision in Foucha, and the split amongst the appellate courts following Foucha. While these cases do not necessarily deal with sexually violent predator statutes, they set out the mental illness standard which formed the backdrop for Hendricks.

Much of civil commitment jurisprudence revolves around the central idea of balancing the individual's liberty interest and due process

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23 Schopp points out that:
.the basic distinction in health care is that between health and pathology. The notion of pathology refers primarily to parts and processes rather than to persons. . . . Persons are mentally or psychologically ill when they suffer some pathology of psychological process that impairs their ability to function to some previously defined level of psychological health.


rights with the state’s obligation to act as a guardian for its citizens. Until the 1970s, civil commitment was relatively uncontroversial—the status quo of involuntary commitment of the mentally ill based on a showing of a need for treatment was generally accepted. In the 1970s, the focus on individual rights of the mentally ill resulted in civil commitment attracting an increased amount of judicial attention. The new rights revolution challenged the very notion of parens patriae, and sought to undermine the historical conception of civil commitment as a benevolent act of the state towards the mentally infirm. The reformers advocated more substantive criteria for civil commitment. In particular, they pushed for more detailed statutory definitions of mental illness and a showing of dangerousness. Thus, arguably, an attempt was made to locate the basis of civil commitment in the state’s police power, as opposed to its parens patriae power. But the courts never really allowed this transformation to take place in its entirety; in a series of cases between the 1970s and the 1990s, they tried to generate a civil commitment jurisprudence that was more cognizant of individual rights, but not wholly removed from the earlier system grounded parens patriae.

The first in this series of cases was the 1975 Supreme Court decision in O’Connor v. Donaldson. In this case, Donaldson brought suit alleging that his involuntary civil commitment constituted a violation of his constitutional right to liberty. He had received no treatment for his illness during confinement, and no claim was ever made that he posed a danger to society. The Supreme Court held that the commitment was unconstitutional. The decision in Donaldson is often cited as having been the first to set out both mental illness and a finding of dangerousness as constitutional predicates for civil commitment. Thus, the Court held that “there is still no constitutional basis for confining such persons involuntarily if they are dangerous to no one and can live safely in freedom.” This seems to indicate that a finding of dangerousness is a constitutional prerequisite for civil commitment. But a comprehensive reading of the judgment suggests that it is more ambiguous than at first

25 Krongard, supra note 11, at 118-19.
26 For example, Michigan’s statute defines mental illness as a “substantial disorder of thought or mood which significantly impairs judgment, behavior, capacity to recognize reality, or ability to cope with the ordinary demands of life.” Mich. Comp. Laws Ann. § 330.1400(g) (West 2006). Many state legislatures began to include “need for treatment” in the criteria for civil commitment. See Krongard, supra note 11, at 120.
28 Id. at 575.
appears. The Court did not conclusively address the question of whether a non-dangerous mentally ill person may be involuntarily committed for the purpose of treatment. By leaving this question open, the Court declined to move civil commitment even further away from its historical roots in the parens patriae power of the state.

The next case was Addington v. Texas, decided four years after Donaldson. Ostensibly, the case concerned a procedural issue: the standard of proof that courts must use in determining whether the statutory criteria for civil commitment have been met. The burden of proof issue is, however, best seen as a proxy for the range of ways in which civil commitment compromises the core protections accorded under the criminal law. Frank Addington was committed to Texas mental hospitals seven times in seven years, which led his mother to file a petition for indefinite civil commitment. In the civil commitment proceeding that followed, a jury found that he was mentally ill and needed to be hospitalized for his own, and others’, welfare. Addington appealed his commitment on due process grounds, claiming that the standard of proof required to commit him was “beyond reasonable doubt.” While the Court did not hold that the standard of proof required was “beyond reasonable doubt,” it did hold that civil commitment was not analogous to any ordinary civil proceeding, and that it required due process protec-

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29 There are two possible interpretations. One is that 'without more' simply refers to the fact that the mental illness must be treatable. The other interpretation is that it requires both mental illness and dangerousness. The former interpretation is put forward by Schopp. See Robert F. Schopp, Civil Commitment and Sexual Predators: Competence and Condemnation, 4 Psychol. Pub. Pol'y & L. 323 (1998). He asserts that O'Connor does not prescribe any minimal constitutional conditions for commitment. Id. at 329. Rather, it should be viewed as an application of the reasonable relationship principle. Id. However, the latter interpretation is more widely accepted—especially in the light of later cases. Chief Justice Burger left open the question of whether the state may commit a non-dangerous, mentally ill individual for the purpose of treatment – and this is at the heart of the present ambiguity. See Krongard, supra note 11, at 121-22.

30 Krongard points out that in O'Connor, the Supreme Court preferred to state the outer-boundaries of the parens patriae power, rather than abandon it. While recognizing the parens patriae power of the state, the court said that this power is subject to due process limitations. See Krongard, supra note 11, at 121-22.


33 Addington, 441 U.S. at 420-21.

34 Id. at 421-22.
Accordingly, the court held that the appropriate standard was one of "clear and convincing evidence." To appreciate how this standard of proof implicitly imposed substantive restrictions on civil commitment requires that a distinction be made between the interests of the state and the means by which they may be enforced. The argument is as follows: The determination of whether an individual should be committed is one that is made in exercise of the police power of the state, and for which the state may resort to the simple bipolar calculus of weighing the harm caused by deprivation of liberty of the individual against the benefit to society. However, the decision to enforce this interest through civil (and not criminal) means is one that relies on the parens patriae power of the state, which calls for a different analysis. This approach can be interpreted as consistent with the requirements of both dangerousness and mental illness—requirements that reflect the fusion of parens patriae and police power and a correspondingly hybrid standard of proof.

While such a reading of Addington is not wholly implausible, neither is it entirely convincing. That there was still some amount of ambiguity in the legal position is illustrated by a few later cases in which courts recognized narrowly drawn exceptions to Addington's clear and convincing evidence requirement. But perhaps the most significant case that rooted commitment exclusively in the police power of the state

35 Id. at 425-30.
36 Id. at 432-33.
37 For an elaborate discussion of this distinction between the interests of the state and the means through which it may enforce these interests, see Janus, Preventing Sexual Violence, supra note 32, at 167-68. Janus suggests that the key paradigm in the jurisprudence of prevention emerges from quarantine—the principle that allows a state to deprive a disease carrying person of his liberty in order to protect public health. Id. at 167. The constitutionality of this form of intervention was upheld in Jacobson v. Massachusetts, 197 U.S. 11 (1905). However, Janus warns that we cannot analogize commitment based on a jurisprudence of preventive detention to this form of intervention based on quarantine. He points out that the courts have never sanctioned the use of civil processes for the purpose of quarantine. Janus, Preventing Sexual Violence, supra note 32, at 167-70. Jacobson involved the imposition of criminal penalties for failure to abide by the public health regulations of the city of Cambridge, requiring vaccination for smallpox. It did not allow the state to deprive an individual of his liberty by means of civil processes. Jacobson, 197 U.S. at 11. Thus, there is a distinction between the scope of regulation and the permissible means of regulation. Janus, Preventing Sexual Violence, supra note 32, at 168.
38 For example, in Jones v. United States, 463 U.S. 354 (1983), the Court authorized automatic civil commitment following a jury verdict of not guilty by reason of insanity. The court held that insanity acquittees constituted a "special class" of candidates for civil commitment. See id.
was United States v. Salerno. The case involved a substantive due process challenge to the Bail Reform Act of 1984 (the Act), which allowed for preventive detention based on a prediction of dangerousness alone. The Court upheld the constitutionality of the Act, citing numerous other cases in which government interests were held to outweigh individual liberty interests. As long as the governmental interest was legitimate and compelling, even indefinite commitment would not amount to a violation of substantive due process rights. Although the decision in Salerno was in an entirely different context, it does provide a foundation for the notion that sex offenders (given their supposedly high recidivism rates) can be civilly committed for the protection of the public. While this notion has never explicitly been cited as the rationale behind sex offender statutes, the extent to which it is actually the basis for such statutes is a recurring theme in this article.

Perhaps the most important case on civil commitment preceding the Hendricks decision was the 1992 Supreme Court decision in Foucha v. Louisiana. The case concerned the constitutionality of a Louisiana statute that allowed for indefinite involuntary commitment of individuals found not guilty by reason of insanity, where these individuals were dangerous but not mentally ill. The trial court found that Foucha (an individual who was committed under the statute) suffered from antisocial personality disorder, which was not a mental illness and not amenable to treatment. The main question before the Court was whether an individual having a mental disorder which is not a mental illness may be involuntarily committed. The Supreme Court held that the commitment was unconstitutional; it thus declined to loosen the constitutional constraints placed on civil commitment. Writing for the majority, Justice White reaffirmed the position that both mental illness and dangerousness were necessary constitutional predicates for civil commitment. In a concurring opinion, Justice O’Connor argued that the state may confine individuals upon a showing of dangerousness and “some medical justification.”

The Court’s decision in Foucha embodies the duality mentioned earlier; while it is fairly certain that mental illness and dangerousness are

41 Salerno, 481 U.S. 739.
43 Id. at 88 (O’Connor, J., concurring).
necessary prerequisites for civil commitment, there is considerable ambiguity surrounding the exact nature of mental illness. Justice O'Connor's reference to "some medical justification" should not be viewed as a departure from the "mental illness" standard. Rather, it is best viewed as representative of a more open-textured and less defined view of mental illness. The difficulty with the decision in *Foucha* is that it perhaps left too much undecided.\(^{44}\) While the Court explicitly rejected the notion that a disorder recognized by the psychiatric community would be deemed a mental illness, it did not set out any parameters for what counts as a mental illness.\(^{45}\)

At this juncture, it may be useful to discuss two alternate conceptions of mental illness— one as a purely clinical categorization, and the other as a legal concept. It is important to note that while the legal concept of mental illness undoubtedly has a clinical component; it is not simply a clinical category. Legal mental illness is a combination of a clinical diagnosis and some normative standard.\(^{46}\) Essentially, people are legally mentally ill when they suffer from an impaired psychological process (which is a clinical judgment) which renders them incapable of meeting some previously determined adequate standard of functioning (a legal determination). The legal determination of what standard of functioning is required may vary across legal purposes.\(^{47}\) This fact—that mental illness is an integrated legal and clinical concept—is often overlooked while reviewing the civil commitment cases. It naturally leads one to ask what the appropriate standard of functioning is, yet neither courts nor legislatures have paid sufficient attention to this question.

An investigation of what standard of functioning has been implicitly adopted by the courts in their determination of mental illness is important because it reveals the actual extent to which mental illness is a limiting principle for civil commitment. While this question has not

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\(^{44}\) Bruce J. Winick, *Ambiguities in the Legal Meaning and Significance of Mental Illness*, 1 PSYCHOL. PUB. POL'y & L. 534 (1995). Winick argues that *Foucha* can be interpreted as laying down a principle of therapeutic appropriateness. Civil commitment is only justified when it can be therapeutically justified as being in the interest of the individual committed. *Id.*

\(^{45}\) *Foucha*, 504 U.S. at 79, 82-83.

\(^{46}\) See supra note 23.

\(^{47}\) Winick suggests that, for example, whether an antisocial personality disorder qualifies as a mental illness for the purpose of employment decisions, prohibiting discrimination on the basis of a handicap, as a predicate for the insanity defense, or for civil commitment, are all separate questions that may well have different responses. See Winick, supra note 44, at 538.
been directly addressed by the courts, several commentators have attempted to discern the limiting principle at work by reviewing court decisions in some of the important commitment cases.\textsuperscript{48} Criminal interstitiality is the principle most commonly cited as a limit on the state’s power of civil commitment.\textsuperscript{49} This principle holds that the criminal justice system is the state’s primary mechanism of liberty deprivation, and that it may only resort to civil commitment when a mental illness or mental disorder diminishes an individual’s responsibility to the extent that the state can no longer vindicate its interest through the criminal justice system.\textsuperscript{50} At first sight, the Court’s decision in \textit{Foucha} seems inconsistent with this principle: Foucha was an insanity acquittee, and therefore evidently non-responsible under the criminal justice system. Yet, the Court held that his commitment was unconstitutional because he was not mentally ill. How could Foucha have been insane (thus absolving him of criminal liability) and yet not mentally ill (so as to warrant civil commitment)? Intuitively, it would seem that the category of mental illness for the purpose of civil commitment should be coextensive with a non-responsibility standard in the criminal law. But that was not the case in \textit{Foucha}. However, on a deeper examination of the facts, the decision in \textit{Foucha} can be reconciled with the principle of criminal interstitiality. Despite the insanity acquittal, a review panel of clinicians at the facility where Foucha was held had reported that he did not presently suffer from any mental illness.\textsuperscript{51} The basis for his insanity acquittal was a temporary drug-induced psychosis. Thus, \textit{Foucha} is not inconsistent with the principal of criminal interstitiality.

To summarize, civil commitment originates from either the state’s police power or its parens patriae power. Under the parens patriae power, the state may resort to civil commitment when the individual’s mental illness renders him incapable of making decisions regarding his own care and treatment. Under the police power, there must be some


\textsuperscript{49} \textit{Janus, Preventing Sexual Violence}, supra note 32, at 161-62.

\textsuperscript{50} \textit{Id.}

principled limits on the state’s power to resort to involuntary civil commitment. The absence of such limits would amount to the acceptance of a jurisprudence of prevention, where commitment would be based on a bipolar calculus that weighs the benefit to the community against the liberty deprivation of the individual. While courts have not analyzed the issue in these terms, their decisions have been interpreted by scholars as revealing the principle of criminal interstitiality as the operative limiting principle on police power commitments.\textsuperscript{52} This principle makes police power commitments hinge on mental illness (resulting in the state being unable to pursue its interests through the criminal law) in the same way that parens patriae power commitments do. To some extent, as was alluded to in the discussion of \textit{Addington}, above,\textsuperscript{53} this amounts to a quasi-fusion of the state’s police power and its parens patriae power. However, it may still be viewed as two alternate bases for commitment; one based on police power limited by the principle of criminal interstitiality, and the other based on parens patriae power.

The purpose of the above discussion is to illustrate the context in which the earlier civil commitment jurisprudence developed. Courts’ accommodation of police power commitments was heavily influenced by an undercurrent of benign parens patriae power as being a co-justification for commitment. Sexual predator statutes were a more direct invocation of the state’s police power, and were somewhat outside the standard civil commitment paradigm.\textsuperscript{54} Clearly, these statutes were at odds with the principle of criminal interstitiality, as they provided for post-incarceration civil commitment. The argument against the validity of sexual predator statutes based on the departure from the principle of criminal interstitiality is most effectively made by Stephen Morse.\textsuperscript{55} The essence of the argument is that the criminal system and the civil commitment system both lead to the detention of dangerous individu-

\textsuperscript{52} See, e.g., Janus, Preventing Sexual Violence, supra note 32, at 210.

\textsuperscript{53} See \textit{Addington v. Texas}, 441 U.S. 418 (1979); notes 31-38 and accompanying text.

\textsuperscript{54} Janus makes the point that cases like \textit{Addington} were decided in a context where therapeutic values were high. Janus, Preventing Sexual Violence, supra note 32, at 162. In contrast, sex offender statutes are far removed from those therapeutic values. Instead, they represent the community’s desire to protect itself from those it perceives to be the most dangerous offenders. \textit{Id}.

\textsuperscript{55} See Morse, Blame and Danger, supra note 48; see also Stephen J. Morse, Fear from Danger, Flight from Culpability, 4 PSYCHOL. PUB. POL’Y & L. 250 (1998) [hereinafter Morse, Fear from Danger]; see also Morse, Uncontrollable Urges, supra note 48.
als, but in neither case is this detention based on dangerousness.\textsuperscript{56} In the case of the criminal system, it is based on culpability (which Morse upholds as the central goal of the criminal system); in the case of the civil system, detention is based on non-responsibility. This conforms to the commonly employed "mad" versus "bad" distinction. Morse suggests that there are some dangerous individuals who do not fit either justification perfectly, and fall into the gap between the civil and criminal system.\textsuperscript{57} This leads to the temptation to blur the civil-criminal distinction to avoid the public peril that would result from leaving such individuals at large. Sexual predator statutes are an example of such blurring of the civil-criminal distinction. Morse asks the question: How can an individual be sufficiently responsible to be criminally culpable, but at the same time not sufficiently responsible so as to warrant civil commitment?\textsuperscript{58} One possible explanation for this is that the criteria for responsibility in the criminal and civil systems differ. In fact, Morse himself cites La Fond's argument that the insanity defense only encompasses cognitive impairments, whereas civil commitment may consider volitional or control criteria as well.\textsuperscript{59} Morse responds to La Fond's argument by stating that the mere existence of a difference in the criteria for responsibility in the two systems does not make such a difference defensible.\textsuperscript{60} In effect, Morse is saying that if there is such a difference, it is morally objectionable and the insanity defense should be broadened to include volitional requirements as well. The underlying idea that drives Morse's argument is that the criminal law is the most "serious, afflictive state intrusion on liberty," and consequently, the standard of responsibility that is required for criminal intervention must necessarily subsume the standard that is required for civil commitment.\textsuperscript{61} In other words, it is not possible for an individual to be non-responsible for the purpose of civil commitment without also being non-responsible for the purpose of criminal law. The fact that sexual predator statutes provide for post-incarceration civil commitment would, according to this argument, render them indefensible per se. Ac-

\textsuperscript{56} Morse disregards the possibility of what he calls "behavioral quarantine" (analogous to medical quarantine) because he views it as incompatible with the liberty interests presently enshrined in the Constitution. See Morse, \textit{Fear from Danger}, supra note 55, at 257.

\textsuperscript{57} See id.

\textsuperscript{58} \textit{Id.} at 258.

\textsuperscript{59} \textit{Id.} at 259 (Morse cites "personal communication" as the source for La Fond's position).

\textsuperscript{60} \textit{Id.}

\textsuperscript{61} Morse, \textit{Blame and Danger}, supra note 48, at 136.
ceptance of this conclusion amounts to saying that sexual predator statutes are irredeemably unprincipled.

Because such a conclusion would foreclose my present project—a search for limiting principles for such commitment—it is important for me to state my differences from Morse's position. Although I share much of Morse's position, my agreement is only tentative because Morse's view is too removed from political realities. The idea that culpability is the central basis for criminal intervention is contestable. The blurring of the civil-criminal distinction, the shift away from culpability as the central basis for criminal intervention, and the reconfiguration of the modern penal system around the issue of social protection is a widespread phenomenon in criminal justice today. The fact that it is widespread certainly does not make it legitimate, but it should influence the manner in which we structure our responses to this problem. An argument against sexual predator statutes premised on a strict separation of the civil and criminal systems would be over-dependent on the acceptance of such a strict separation in criminal justice more generally. In contrast, this article accepts the dilution of the civil-criminal distinction as a characteristic of modern penal systems. Essentially, if the objective is to constrain the extent of intervention with respect to mere dangerousness, the strict separation of the criminal and civil system acts as one of several potential limiting principles—one that has traditionally been employed and that is aesthetically most appealing to any academic. Today, this principle seems to have been discarded, although Morse and others have made valiant efforts to resurrect it. While I am sympathetic to their efforts, I am skeptical about the receptivity of modern criminal justice discourse to this traditional limiting principle. Accordingly, this article is an effort to broaden the search for limiting principles.

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62 This is not, in any way, meant to suggest that Morse is oblivious to such realities. In fact, by setting out the civil-criminal distinction (based on the culpability and non-responsibility predicates), and referring to it as the "standard account"—Morse seems aware of the classicist nature of his argument. *Id.* at 135-36.


64 In fact, in some way, Morse is also exploring the possibility of limiting principles (for example, his rejection of La Fond's argument is a rejection of a possible limiting principle). However, my own discussion of potential limiting principles (at least the first part) is more focused on how the courts have grappled with this problem, and whether they have succeeded or failed.
Because sexual predator statutes are qualitatively different from other forms of civil commitment, courts had to determine their constitutionality against the backdrop of a civil commitment jurisprudence that was developed in a different context. Several of these statutes were challenged in the post-\textit{Foucha} period, and courts were divided on the issue of whether they were constitutional. Some courts interpreted sexual predator statutes as being analogous to post insanity defense commitment statutes (as in \textit{Foucha}), and, therefore, held them to be unconstitutional because they allowed for indefinite involuntary commitment without requiring mental illness.\footnote{65 See, e.g., \textit{In re} Hendricks, 912 P.2d 129 (Kan. 1996).} Other courts, while recognizing the mental illness requirement, held that sexual predator statutes complied with this requirement and were therefore constitutional.\footnote{66 See, e.g., \textit{In re} Matter of Linehan, 544 N.W.2d 308 (Minn. 1996) (holding sexually dangerous persons statute constitutional); \textit{State v. Post}, 197 Wis.2d 279 (1995) (holding statute authorizing civil commitment of sex offenders constitutional); \textit{In re} Blodgett, 510 N.W.2d 910 (Minn. 1994) (holding sexual predator statute constitutional); \textit{In re} Young, 122 Wash.2d 1 (1993) (holding statute authorizing civil commitment of sexual predators constitutional).} For example, in \textit{In re Blodgett},\footnote{67 \textit{In re} Blodgett, 510 N.W.2d 910 (Minn. 1994).} the Minnesota Supreme Court interpreted \textit{Foucha} as not restricting the mental disorder required to any typical kind of mental illness. Accordingly, the court upheld the constitutionality of Minnesota's sexual predator statute. The U.S. Supreme Court denied Blodgett's petition for certiorari review.

Following \textit{Foucha}, it was clear that mental illness is a constitutional predicate for civil commitment.\footnote{68 See \textit{Foucha} v. Louisiana, 504 U.S. 71, 74-75 (1992).} There is disagreement, however, about what constitutes mental illness for the purpose of civil commitment.\footnote{69 See, e.g., \textit{In re} Young, 122 Wash.2d 1; \textit{In re} Hendricks, 912 P.2d 129 (Kan. 1996).} The abstract nature of legal mental illness in the civil commitment context leads us to two considerations: First, if the criminal justice system and the mental health system are two alternate forms of social control, a precise delineation of their respective domains based on a consistently applied mental illness criterion is important for the legitimacy of both systems. Second, is the ambiguity surrounding mental illness a problem of boundary-drawing or is it a case of mental illness not being at the heart of the problem in the first place? Some studies that have tried to establish the relationship between psychiatric illness and sex offending have revealed that only eight percent of sex offenders suffer
from psychiatric illness. If sex offending, and not mental illness, is our primary concern, then clearly the data show that mental illness is a bad proxy for dealing with sexual offenders.

II. Kansas v. Hendricks: Lack of an Effective Limiting Principle

Following the brutal rape and murder of Stephanie Schmidt by a convicted rapist on parole, the Kansas legislature passed the Kansas Sexually Violent Predators Act in 1994 (the Kansas SVP Act). The Kansas SVP Act provided for civil commitment of sexually violent predators. A sexually violent predator is defined as "any person who has been convicted of or charged with a sexually violent offense and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in predatory acts of sexual violence." Kansas already had a general civil commitment statute. The very fact that there was a perceived need for a separate statute specifically for sexually violent predators suggests that the general statute could not have addressed the concerns about violent recidivist sex offenders. Therefore, the standard for commitment in the new statute must involve some departure from the mental illness standard of the general civil commitment statute (if the standards were identical, there would be no need for a separate statute). This intuition is confirmed by the preamble to the Kansas SVP Act, which states that there is a "small but extremely dangerous group of sexually violent predators who do not have a mental disease or defect that renders them appropriate for involuntary commitment pursuant to the [general statute]."

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71 In this section of the article, I traced the evolution of the concept of mental illness in the civil commitment context and how it was subsequently adopted in the sex offender commitment context, despite the qualitative differences that exist between sexual predator commitments and standard civil commitment cases. In the next few sections, I discuss potential limiting principles for sex offender commitment. Some such principles rely on a diluted concept of mental illness, while other potential limiting principles are completely outside the mental illness paradigm and instead focus on dangerousness per se.


The fact that sex offender statutes depart from the mental illness standard is sometimes accorded too much importance. While it is true that these statutes seem to embrace a wider standard, the mere fact that they depart from an ineffectively and incompletely articulated mental illness standard is, in itself, not cause for grave concern. I prefer to view this shift in standards against the backdrop of the state’s parens patriae and police powers to more meaningfully evaluate the legitimacy of such a shift. If sex offender statutes are based on the parens patriae power of the state, they should adopt the same standard for commitment as general commitment statutes. It is clear that they do not. If, on the other hand, these statutes are grounded in the state’s police power, the situation is more complicated. We have seen from the early civil commitment cases that the courts have generally tended to require even police power commitments to be co-justified by a parens patriae interest. Sex offender statutes are a variation of this fusion of parens patriae and police power interests. While the early cases tied police power commitments to a minimal parens patriae requirement that the individual be mentally ill, sex offender statutes essentially involve weighing police power interests against parens patriae interests; police power interests are supposedly stronger and accordingly, the parens patriae standard is diluted from mental illness to “mental abnormality or personality disorder.” I refer to this as the “double bipolar calculus.” The first leg involves determining whether there is a police power interest (based on benefit to society and deprivation of liberty to the individual). The second leg involves determining the appropriate parens patriae threshold depending on the strength of the police power interest.

The last section of this article addresses the first leg of the calculus; whether, in fact, there is a justifiable police power interest based on recidivism of sex offenders. This section addresses the diluted standard of “mental abnormality and personality disorder.” It should be noted at the outset that the fact that this standard is broader than the mental illness standard is only to be expected. Also, given the double bipolar calculus, it may even be justified.\footnote{See infra notes 91-112 and accompanying text.}

\footnote{Of course, this necessarily depends upon first accepting the legitimacy of the double bipolar calculus, and whether police power interests can and should be weighed against parens patriae interests—but I take this to be consistent with the approach of the courts in earlier cases where they required a parens patriae co-justification.}
The "mental abnormality and personality disorder" standard is not just broad, it is circular and transparent, and is essentially a non-standard that acts as dressing for what are actually commitments grounded purely in the state's police power interests. Thus, sex offender commitments cannot be justified even by an elaborate double bipolar calculus framework—for the statute articulates not just a diluted standard, but effectively no standard at all.

The Kansas SVP Act was applied for the first time in the case of Leroy Hendricks. Hendricks had previously been convicted in 1984 for taking "indecent liberties" with two teenaged boys, and had been sentenced to five to twenty years in a state prison. Shortly before his scheduled release from prison, the state invoked the SVP statute to have Hendricks civilly committed as a sexually violent predator. "At the subsequent jury trial, Hendricks testified as to his past history of sexual offenses and his self-described inability to refrain from committing such offenses, stating that he 'can't control the urge.'" Hendricks' diagnosis, as put forward by expert witnesses, was "personality trait disturbance, passive-aggressive personality and pedophilia. . . . The jury unanimously found beyond reasonable doubt that Hendricks was a sexually violent predator." In addition, the judge concluded as a matter of law that pedophilia was a "mental abnormality" within the meaning of the Kansas statute, and Hendricks was subsequently committed. Hendricks challenged his commitment, and it was reversed by the Kansas Supreme Court, which struck down the SVP statute because it was found to violate the Due Process Clause of the U.S. Constitution. The court held that the "mental abnormality" threshold violated substantive due process requirements for failing to require "mental illness"

78 Kansas v. Hendricks, 521 U.S. 346 (1997). For a discussion of how, in many ways, Hendricks was an ideal test case, see Jeffrey R. Glovan, I Don't Think We're in Kansas Anymore Leroy: Kansas v. Hendricks and the Tragedy of Judicial Restraint, 30 McGeorge L. Rev. 329, 337-39 (1999). Glovan points out that Hendricks was in his sixties, had spent half his adult life in jail, and each time he was imprisoned, it was for sexual offences involving children.

79 Hendricks, 521 U.S. at 353, 355.

80 Interestingly, Hendricks had pleaded guilty in the 1984 cases, as a result of which the state dropped one count and did not seek a longer sentence under the state's recidivism sentencing law. See Friedland, supra note 72, at 95-96.

81 Perlin, supra note 48, at 1260-61.

82 Id. at 1261.

83 Id.

84 The statute was challenged on due process, double jeopardy and ex post facto grounds—but the court did not need to decide on double jeopardy and ex post facto. See In re Hendricks, 912 P.2d 129 (Kan. 1996). See also Glovan, supra note 78, at 338-39.
as a precondition for detention. Finally, the case came before the U.S. Supreme Court.\textsuperscript{85}

Hendricks challenged the Kansas statute under the Due Process Clause, the Double Jeopardy Clause, and Ex Post Facto Clause.\textsuperscript{86} The due process challenge concerned the "mental abnormality" requirement in the Kansas SVP Act and whether it satisfied substantive due process. The others concerned whether the lack of treatment made such commitment punitive in nature.\textsuperscript{87} The issue of whether lack of treatment renders such commitment punitive in nature challenges the characterization of such commitment as "civil." For my present purpose (which is an analysis of potential limiting principles for civil commitment), I will refrain from discussing these issues. Rather, I shall focus on the challenge under the Due Process Clause.\textsuperscript{88}

Justice Thomas, who was joined by Chief Justice Rehnquist and Justices O'Connor, Scalia, and Kennedy, wrote the majority opinion in \textit{Hendricks}. He conceded that freedom from physical restraint was a core interest protected by the Due Process Clause, but proceeded to say that this liberty interest could be outweighed by the state's interest in maintaining order and safety.\textsuperscript{89} After reviewing precedent, Justice Thomas argued that the Supreme Court had "consistently upheld civil commitment statutes provided the confinement takes place pursuant to proper procedures and evidentiary standards" and does not offend the sense of ordered liberty.\textsuperscript{90} The Court held that the Kansas statute's "mental abnormality" or "personality disorder" requirement was in consonance with commitment statutes that the court had earlier upheld.\textsuperscript{91}

Justice Thomas's opinion in \textit{Hendricks} has often been criticized on the grounds that it involved a misinterpretation of precedents.\textsuperscript{92} Based on a review of earlier civil commitment cases, Justice Thomas held that

\textsuperscript{85} The State of Kansas petitioned the Kansas Supreme Court for a writ of certiorari. Hendricks followed with a cross-petition reasserting his double jeopardy and ex post facto claims. \textit{See also} Glovan, supra note 78, at 339-40.

\textsuperscript{86} \textit{In re Hendricks}, 912 P.2d at 133.

\textsuperscript{87} \textit{See} ANITA SCHLANK & FRED COHEN, \textsc{The sexual predator: law, policy, evaluation and treatment} 3 (1999).

\textsuperscript{88} On this point, Justice Breyer, who dissented in \textit{Kansas v. Hendricks}, 521 U.S. 346 (1997) was in agreement with the majority that the statute's mental abnormality requirement complied with substantive due process. \textit{Id.} at 373.

\textsuperscript{89} \textit{Id.} at 356-57.

\textsuperscript{90} \textit{Id.} at 357. \textit{See also} Glovan, supra note 78, at 340-46.

\textsuperscript{91} \textit{Id.} at 358.

\textsuperscript{92} \textit{Infra} note 95.
the term mental illness was "devoid of any talismanic significance." 93 He cited various terms used by courts in the past—"emotionally disturbed," "mentally ill," "incompetency," "insanity"—and concluded that courts have used various terms to describe those who are properly subject to confinement. 94 While it is true that courts have used a multiplicity of terms, critics have pointed out that it is quite clear that the two leading cases—Foucha and Addington—turn on the notion of mental illness. 95 In fact, in Foucha, as has been discussed earlier in this article, the commitment was reversed because an antisocial personality disorder did not amount to mental illness. 96 Once Justice Thomas was able to create the fiction that terms relating to mental conditions are essentially indistinguishable and courts have used them interchangeably, it was fairly easy to dismiss the due process claim on separation-of-powers grounds. 97 He simply deferred to the state legislature with regard to the nomenclature adopted in civil commitment statutes. 98 The state legislatures had the discretion to define terms of a medical nature that had legal significance. 99 Thus, the "mental abnormality" or "personality disorder" requirement was held not to violate substantive due process. 100

Krongard points out that not even the state of Kansas had attempted to argue that the issue was one of semantics. 101 The Kansas legislature recognized the distinction between "mental illness" (as defined in the general civil commitment statute) and "mental abnormality," and acknowledged that the latter had a broader connotation than

93 Hendricks, 521 U.S. at 359.
94 Id. at 358.
95 For a detailed discussion of how Justice Thomas's opinion reflects a misinterpretation of precedents regarding the notion of mental illness as a constitutional predicate for commitment, see Krongard, supra note 11, at 130-31. For example, Justice Thomas cited Addington for the broad proposition that the courts have upheld civil commitment statutes provided the confinement takes place pursuant to proper evidentiary and procedural standards, but he did not mention that one of the "statutory requirements for which the court required a heightened standard of proof in that case was 'mental illness.'" Hendricks, 521 U.S. at 357; Krongard, supra note 11, at 130.
97 For an analysis of Justice Thomas's opinion as creating this fiction, and then using a separation of powers argument, see Krongard, supra note 11, at 131.
98 Hendricks, 521 U.S. at 359.
99 Id.
100 Id. at 360.
101 See Krongard, supra note 11, at 131.
the traditional characterization of mental illness. Thus, the Kansas SVP Act was admittedly broader in nature, and was grounded in the police power of the state to maintain order and safety. The relevant questions from a due process standpoint were as follows: First, was the broad ambit of the statute exclusively grounded in the police power of the state (with the mental abnormality requirement being a superficial cloak), and if so, did such commitments for the purpose of social protection (based on the police power of the state) satisfy substantive due process? Second, if the legitimacy of the statute is to be viewed within the double bipolar calculus framework (such that a standard less than mental illness would be sufficient because of the strong police power interest in confining sex offenders), is the diluted “mental abnormality” requirement an effective standard? By denying the distinction between mental illness and mental abnormality, Justice Thomas’ opinion precludes a discussion of either of these questions. It avoids asking the crucial question of whether the diluted mental abnormality standard satisfies due process. The fact that the statute was held to be constitutional, even though the mental abnormality standard is broader than the traditional characterization of mental illness, is not, in my view, objectionable. On the other hand, it is objectionable that it was held to be constitutional without first recognizing that mental abnormality is a broader category (and therefore without a discussion of the grounds on which such a broader category may be held to satisfy due process).a

Thus far, I have addressed the reasoning in Justice Thomas’ opinion, and how it avoided answering the main questions at issue in Hendricks. I have already pointed out that, given the state’s heightened police power interest, a more diluted mental abnormality standard may be considered sufficient. I now turn to the content of the “mental abnormality” or “personality disorder” standard to evaluate whether the standard sets forth an effective limiting principle for civil commitment.

“Mental abnormality” is not a medically recognized diagnostic term. It is defined in the Kansas SVP Act as a “congenital or acquired

102 KAN. STAT. ANN. § 59-2901 to -2944 (repealed 1996); KAN. STAT. ANN. § 59-29a01 to -29a21 (2005).
103 Krongard strongly asserts that through a series of vague interpretations of precedent and semantic trickery, Justice Thomas transformed a case about substantive due process limitations on a state’s power to override an individual’s liberty, into a case about the state legislature’s power to define its own terms. See Krongard, supra note 11, at 131.
104 It is not included in the American Psychiatric Association’s Diagnostic and Statistical Manual of Mental Disorders. Some psychiatrists are of the view that the notion of “abnormality”
condition affecting the emotional or volitional capacity which predisposes the person to commit sexually violent offences.”

“Volitional capacity” refers to the capacity to exercise choice or will. “[E]motional capacity accounts for bad behavior induced by some individual factor other than a lack of control.”

The main criticism of the mental abnormality standard is that it is circular in nature—the 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. Thus, the mental abnormality standard is completely illusory, and civil commitment is based on nothing more than predicted recidivism. If the term mental illness was “devoid of any talismanic significance,” it seems that the term “mental abnormality” is devoid of any significance at all. As Stephen Morse puts it, “the definition (of mental abnormality) presupposes what it is trying to explain.” Morse also makes the point that it seems odd to define mental abnormality in relation to the penal code (e.g., sexually violent offenses), because that seems to imply that the scope of the term “mental abnormality” will expand or contract depending on legislative decisions to criminalize certain conduct.

In Hendricks, the term “mental abnormality” seems to have been understood by reference to the list of mental disorders in the American Psychiatrists Association’s Diagnostic and Statistical Manual of Mental Disorders (DSM-IV). However, even so understood, the mental abnormality standard is overbroad for the purpose of civil commitment. The purpose of the DSM-IV is to achieve a uniform nomenclature to facilitate statistic-gathering and information exchange with respect to certain reported medical conditions—it does not purport to define any legal standard for mental illness. “[T]he DSM includes categories like

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107 For an example of a critical account of the mental abnormality standard based on its circular nature, see Pfaffenroth, supra note 48, at 2238-39.
109 Morse, Uncontrollable Urges, supra note 48, at 1050.
110 Id.
111 Hendricks, 521 U.S. at 375-77; see also Krongard, supra note 11, at 134-35.
112 Krongard, supra note 11, at 134-35.
alcoholism, female orgasmic disorder, nightmare disorder, caffeine induced sleep disorder etc."\(^\text{113}\)

The term "personality disorder" is perhaps even broader in scope than "mental abnormality."\(^\text{114}\) While it is not defined in the Kansas SVP Act, it is defined in the DSM-IV as "an enduring pattern of inner experience and behavior that deviates markedly from the expectations of the individual's culture."\(^\text{115}\) Personality disorder includes "antisocial personality disorder" (APD)—a condition found in 40% to 75% of all convicted criminals.\(^\text{116}\) There is no unitary APD diagnosis—there are 3.2 million diagnostic variations in DSM-IV alone.\(^\text{117}\) The mental abnormality/personality disorder standard has been criticized as being over-inclusive to the extent that it is not an effective standard at all.

At the root of the debate over whether mental abnormality/personality disorder is an effective standard is the issue of whether sex offending is explained by sexual deviance or social deviance—is it reflective of pathology or criminality? But is this really the central issue? Does it matter whether behavior is explained by sexual deviance or social deviance? Both forms of deviance are merely explanatory of a certain pattern of behavior. The fact that these patterns of socially deviant behaviors now have psychiatric correlates does not make these correlates a sufficient legal conception of mental illness for the purpose of civil commitment. Besides, the circularity of the mental abnormality standard in the law may be reflective of a similar circularity in the medical profession. Reports have indicated that "49% of psychiatric diagnoses given to [mentally disordered sex offenders] were that of 'sexual deviation.'"\(^\text{118}\) The nature of these psychiatric categories alerts us to two things. First, these categories are explanatory of certain behavior and are not excusatory with respect to the actors who indulge in that behavior. This is consistent with the fact that sex offender statutes target individuals post-incarceration (if the categories were excusatory, they would be

\(^{113}\) \text{Id.}\)

\(^{114}\) It refers to rigid maladaptive personality traits that result in significant functional impairment or subjective distress. These disorders have no organic source and are not treatable by psychotropic medication—they are closer to cultural phenomena than medical illnesses. \text{See} Friedland, \textit{ supra} note 72, at 116.

\(^{115}\) Hamilton, \textit{ supra} note 106, at 492.

\(^{116}\) Gottlieb, \textit{ supra} note 12, at 1040.


\(^{118}\) Sahota & Chesterman, \textit{ supra} note 70, at 272.
incompatible with criminal responsibility and blame). But how exactly do these categories invoke the parens patriae interest of the state? I do not suggest that the only way to do so is if the categories were excusatory—I only suggest that the current standards do not tell us where to draw the line. This brings me to the second point. Definitions of “personality disorders” in the DSM-IV could easily be seen to be culturally dependent (viewed as measured deviations from conventionally accepted norms) rather than medically justified. The idea that sexual misdeeds are symptoms of underlying sexual perversion is little more than a hundred years old—and can be traced principally to the work of Richard Von Kraft-Ebing in the 1880s. Prior to that, sex offenses were characterized as moral evil or lust. In the twentieth century, the focus shifted to medical justifications. However, psychiatric understanding of sex offending is far from perfect—in the twentieth century, it was once believed that the clinical aspects of rapists are that they are short fat men. What, then, justifies our supreme confidence in the list of disorders in the latest edition of the DSM? The mental abnormality/personality disorder standard does not provide a standard that can adequately invoke the parens patriae interests of the state—it departs from the traditional mental illness standard, and does not provide an acceptable alternative conception of mental illness for the purpose of civil commitment. This standard is only explanatory of certain patterns of behavior, and not excusatory with respect to such behavior. It is therefore unable to serve as an effective limiting principle for committing sexually violent predators.

This leads me to the question of treatment. Requiring treatment for the disorder could potentially serve as a limiting principle. In an article published in 1995, Bruce Winick argued that Foucha laid down a new principle of “therapeutic appropriateness.” The commitment in that case was held to be unconstitutional even though it satisfied the police power interest of the state, because it could not be therapeutically justified as being in the interest of the individual committed. But how do we decide whether a certain treatment is in the interests of the individual? Where the mental disorder is defined by reference to dangerous-

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119 Homosexual relations were captured by the earlier generation of sex offender laws. See Philip Jenkins, Moral Panic: Changing Concepts of the Child Molester in Modern America (1998).
120 For a detailed discussion of sex crime as a constructed category, see generally id.
121 Id.
122 Winick, supra note 44, at 534.
ness, the only way to determine the effectiveness of treatment is to examine whether it reduces recidivism. There is a general consensus that treated sex offenders have lower rates of recidivism than non-treated sex offenders,\textsuperscript{123} which is a genuine basis for arguing that treatment is an effective limiting principle.\textsuperscript{124} I now briefly turn to the issue of treatment, and the Court's analysis of this issue in *Hendricks*.

As a formal matter, the Court's analysis in *Hendricks* did not focus on whether treatment was an appropriate limiting principle for what were concededly civil commitments.\textsuperscript{125} Rather, the issue was phrased in terms of the necessity of treatment for categorizing commitment as civil in nature.\textsuperscript{126} In order to address the double jeopardy and ex post facto claims, the Court needed to determine whether the sexual predator law was civil or criminal in nature. Hendricks asserted that the law was punitive because it did not provide for treatment.\textsuperscript{127} The Kansas Supreme Court held that absent a treatable mental illness, Hendricks could not be detained (because such detention would then amount to punishment, and would be in violation of the Double Jeopardy and Ex Post Facto clauses).\textsuperscript{128} The U.S. Supreme Court, however, held that "incapacitation may be a legitimate end of the civil law."\textsuperscript{129} In other words, regardless of treatment, the law could be considered civil. In support of this finding, Justice Thomas cited *Allen v. Illinois*.\textsuperscript{130} In *Allen*, the issue was whether a statute authorizing confinement of sexually dangerous persons with a mental disorder, similar to that of Kansas, was civil or criminal in nature. As Justice Breyer argued in his dissent in *Hendricks*, the Court in *Allen* looked at treatment as the differentiating factor—as the touchstone for distinguishing civil from punitive purposes.\textsuperscript{131} It held the statute to be civil in nature because it provided for treatment,

\textsuperscript{123} For a summary of the literature, see generally Center for Sex Offender Management, Office of Justice Programs, U.S. Department of Justice, Recidivism of Sex Offenders (May 2001), http://www.csom.org/pubs/recidsexof.html.
\textsuperscript{124} This argument also reflects the fusion of police power and parens patriae power. In order to conclude that treatment is in the interests of an individual, we need to ascertain that treatment more effectively serves a police power interest.
\textsuperscript{126} Id. at 367-69.
\textsuperscript{127} Id. at 365.
\textsuperscript{128} The statute itself concedes that this class of offenders is not treatable, and the Kansas Supreme Court accordingly found the statute's treatment provisions "somewhat disingenuous." Id.
\textsuperscript{129} Id. at 365-66.
\textsuperscript{130} 478 U.S. 364 (1985).
\textsuperscript{131} *Hendricks*, 521 U.S. at 381-91.
and not punishment. Thus, Justice Thomas’s majority opinion in *Hendricks* is in stark contradiction to the holding in *Allen*, yet he cites *Allen* in support of his position. Further, Justice Thomas analogizes the civil commitment of sexual predators to the quarantine of those with highly contagious diseases, and cites the case of *Compagnie Francaise de Navigation à Vapeur v. Lousiana Board of Health*. This case was decided in 1902 and involved prohibiting a French ship from arriving in New Orleans, because of the prevalence of a contagious disease at the port of arrival. Justice Thomas’s reliance on this case has been criticized by those who view it as a case from a different era, in which the primary motive was to limit the contagion effect of the disease—a concern that is not present with respect to the commitment of sexually violent predators.

The *Hendricks* majority also offered an alternate interpretation of the Kansas Supreme Court opinion, in which it interpreted the lower court’s decision as having held that while the statute does provide for treatment as an ancillary goal, treatment was not provided in this particular case. The U.S. Supreme Court essentially is willing to overlook this delay in providing treatment, because *Hendricks* was the first case under the statute, and the state may need some time to organize treatment facilities and programs. To summarize, the *Hendricks* majority effectively allows the state to commit those who do not suffer from a mental illness, who are not amenable to treatment (or to whom treatment is not given), and who have already been punished for their wrongdoing.

It is perhaps best to understand the mental abnormality/personality disorder standard in terms of the resistance of both the legislatures and the courts to openly embrace purely police power commitments. This resistance can be seen at several levels. The legislatures clearly perceive a need for protection against sexually violent predators. However, sex offender statutes do not claim to derive their legitimacy from the police power of the state. Rather, the statutes are best viewed as an appeal to both the police power and the parens patriae power—with the parens patriae threshold being lowered on account of a heightened police power interest (this is the double bipolar calculus that was described in the beginning of this part). Courts are even further removed than the legislatures in acknowledging the real interests in operation. In *Hendricks*,

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133 186 U.S. 380 (1902).
134 Friedland, supra note 72, at 114.
the Court effectively validated police power commitments in a manner where it completely denied that commitment of sexual predators was qualitatively different from the general civil commitment paradigm in which the mental illness threshold had first been developed. Thus, it validated police power commitments without acknowledging their police power character. This precluded discussion of both the double bipolar calculus framework, and pure police power commitments from a due process standpoint. Even if this discussion had not been precluded, the mental abnormality/personality disorder standard would not support the double bipolar calculus framework because it fails to draw any line at all. The Supreme Court attempted to remedy this problem in the case of Kansas v. Crane by clarifying its decision in Hendricks.

III. Kansas v. Crane: The 'Lack of Control' Standard

The decision in Hendricks was ambiguous on the question of whether due process required a finding that a person is unable to control his behavior. Hendricks was a pedophile who admitted that he was unable to control his behavior. Whether a finding that the offender was unable to control his behavior is required in cases where there was no such admission was less clear, however. This was the question presented in Crane.

In January 1993, Michael Crane entered a tanning salon in Johnson County, Kansas, and exposed himself to the 19-year-old female attendant. Half an hour later, he entered a nearby video store, exposed his genitals to the 20-year-old female clerk, demanded that she perform oral sex on him, threatened to rape her, and then suddenly ran out of the store. Crane was convicted of lewd and lascivious conduct for the former incident, and for attempted aggravated criminal sodomy, attempted rape, and kidnapping for the latter. He was sentenced to thirty-five years to life in prison. The Supreme Court of Kansas reversed the convictions for attempted aggravated criminal sodomy, attempted rape, and kidnapping (in part because the state had not charged the necessary elements). Crane subsequently pled guilty to one count

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136 Id. at 411.
138 Id. at 1259.
139 Id. at 1258.
140 Id. at 1267-69, 1274.
of aggravated sexual battery. He was released from prison after five
years.\footnote{In re Crane, 7 P.3d 285, 291 (Kan. 2000); see also Hamilton, supra note 106, at 481 (summarizing the facts of Crane).} The State sought to have Crane committed under the Kansas SVP Act.

Crane challenged his commitment, and the case finally came before the U.S. Supreme Court. Crane argued that Hendricks required the state to show that a person was completely unable to control his behavior.\footnote{The Kansas Supreme Court had agreed with Crane’s contention. State v. Crane, 918 P.2d 1256, 1258 (Kan. 1996).} Crane had been diagnosed as suffering from antisocial personality disorder and exhibitionism. Even the state’s witnesses agreed that Crane had significant control over his actions; therefore, had Crane’s argument been accepted, his commitment would have to be invalid.\footnote{Pfaffenroth, supra note 48, at 2243.} The state, on the other hand, argued that Hendricks did not require any separate showing of inability to control behavior. The state interpreted Hendricks as setting forth the causal link standard—that the person engaged in harmful conduct because of the mental abnormality or personality disorder (the lack-of-control aspect was subsumed by the causal link between the mental abnormality/personality disorder and the harmful conduct).\footnote{There is a causal link in the words “which makes the person likely to engage in.” See KAN. STAT. ANN. § 59-29a02(a) (2005).}

The Supreme Court rejected both these positions and adopted a middle ground; while it rejected the argument that Hendricks required a showing of complete lack of control, the Court held that a separate finding of lack of control was required in order to satisfy due process. Rejecting the argument that Hendricks required a showing of complete lack of control was relatively straightforward. Justice Breyer, who wrote the majority opinion, relied on Hendricks’ reference to the Kansas SVP Act as requiring a mental abnormality or personality disorder that made it “difficult, if not impossible, for the [dangerous] person to control his dangerous behavior.”\footnote{Crane, 534 U.S. at 410.} The use of the word “difficult” suggested that Hendricks did not envisage absolute lack of control. Justice Breyer stated that “most severely ill people—even those commonly termed ‘psychopaths’ retained some ability to control their behavior.”\footnote{Id. at 412.} Thus, insistence on an absolute standard of lack of control would not allow for
the confinement of extremely dangerous individuals with a mental abnormality/personality disorder.

The Supreme Court’s rejection of the causal link standard and its holding that due process required a separate finding of lack of control is somewhat more contentious. Justice Breyer stated that substantive due process required “proof of serious difficulty in controlling behavior.”\(^{147}\) The Court viewed \textit{Hendricks} as restricted to its facts; in that case, there was evidence of an inability to control behavior. While \textit{Crane} purportedly clarifies the decision in \textit{Hendricks}, it actually raises the standard for civil commitment.

This extension of the due process requirements for civil commitment was heavily criticized on the grounds that it adds a requirement that was not present in the statute. Steve Lee suggests that in relying on the phrase “difficult, if not impossible for the [dangerous] person to control his dangerous behavior” in the \textit{Hendricks} decision to justify the lack of control standard, Justice Breyer erred by adopting a “somewhat mangled textualist approach.”\(^{148}\) Lee points to the sentence following the phrase Breyer relied upon in the \textit{Hendricks} decision: “the precommitment requirement of a ‘mental abnormality’ or ‘personality disorder’ is consistent with the requirements of these other statutes that we have upheld in that it narrows the class of persons eligible for confinement to those unable to control their dangerousness.”\(^ {149}\) This suggests that \textit{Hendricks} favored the causal link standard whereby a showing that mental abnormality/personality disorder would cause the person to be a danger in the future would be a sufficient precondition for civil commitment.\(^ {150}\) The \textit{Hendricks} decision does not seem to mandate a volitional requirement for civil commitment under the Kansas SVP Act.

That the Supreme Court seemingly erred in its interpretation of \textit{Hendricks} when it extended the due process requirements to include a lack of control standard is certainly an important issue. However, my

\(^{147}\) Id. at 413.


\(^{149}\) Id. at 387.

\(^{150}\) In his dissenting opinion in \textit{Kansas v. Crane}, 534 U.S. 407, 415-25 (2002) (Scalia, J., dissenting), Justice Scalia forcefully makes the point that the statute, as written, did not require a separate control requirement, and the “causal connection” between the mental disorder and the future acts of sexual violence already assumed lack of control. See Hamilton, supra note 106, at 99.
present purpose is to explore the potential limiting principles for civil commitment and not to judge the legitimacy of the Supreme Court’s shift from one to the other of such principles. Correctly decided or not, *Crane* is a more genuine attempt at moving towards a non-responsibility standard.\(^{151}\) Perhaps the court recognized the sweep of its earlier decision, and was looking for any possible way to contain the broad reach of *Hendricks*. On its facts, *Hendricks* was an easy case to decide because Hendricks was just the sort of person the Kansas SVP Act was tailored for. The implications of the decision may only have become apparent to the Court after it was decided. Nationally, the number of sexually violent predators held in states with laws similar to the Kansas SVP Act increased from 523 in August 1998 to 1,200 in June 2001.\(^{152}\) The over-inclusiveness of the mental abnormality/personality disorder categories is preserved by interpreting the statutory text as setting forth the causal link standard. The causal link standard did not sufficiently narrow the class of persons eligible for confinement, however. The lack-of-control standard articulated in *Crane* does, however, narrow the class of persons eligible for confinement beyond those that have a mental abnormality/personality disorder.

Justice Scalia’s dissent in *Crane* identified two problems with the lack-of-control standard.\(^{153}\) The first problem concerns the requirement of volitional control in every case, even when commitment is permissible on account of emotional impairments. Justice Scalia pointed out that the rigid volitional requirement may prevent the commitment of a “man who has a will of steel, but who delusionally believes that every woman he meets is inviting crude sexual advances.”\(^{154}\) In *Crane*, the majority opinion was quite vague on the matter of emotional impairments. The majority recognized that there may be considerable overlap between “volitional, emotional and cognitive impairments.”\(^{155}\) The Court seemed to suggest that overlapping impairments could cause “serious difficulty in controlling behavior.”\(^{156}\) But the majority conspicuously left open the question of whether a person may be committed on the basis of a purely emotional impairment (i.e., one with no accompa-

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\(^{151}\) For an analysis of the causal link standard as tautologically automatic, see Morse, *Uncontrollable Urges*, supra note 48, at 1044.

\(^{152}\) See Pfaffenroth, supra note 48, at 2242.


\(^{154}\) Id. at 422.

\(^{155}\) Id. at 415 (majority opinion).

\(^{156}\) Id. at 415.
nying element of volitional impairment).\(^{157}\) In leaving this question open, while simultaneously prescribing a volitional requirement, the majority opinion creates some confusion.

Crane creates confusion in another, more important, respect. The opinion does not quantify the lack of control necessary to justify civil commitments. Stephen Morse correctly states that, “Crane upheld the crucial non-responsibility criterion for involuntary civil commitment by imposing a lack of control standard, but left open the constitutional meaning of lack of control.”\(^{158}\) The majority in Crane deliberately left the issue of the quantum of lack of control vague, and justified doing so by stating that, the “Constitution’s safeguards of human liberty in the area of mental illness and the law are not always best enforced by precise bright-line rules.”\(^{159}\) While the lack-of-control standard is an honest attempt at constructing a non-responsibility standard for civil commitment, the very fact that the Court did not know where to draw the line (and left this task to state legislatures) suggests that it is a standard that is unworkable in the legal context. Georgia Smith Hamilton points out that the lack-of-control standard “incorporates no legal construct that would enable courts to make normative determinations regarding an offender’s ability to control his behavior.”\(^{160}\) Besides, a lack-of-control standard is almost impossible to implement given that it is extremely difficult to “distinguish an irresistible desire from one that is simply not resisted.”\(^{161}\) Even with expert testimony, it is very difficult to tell one from the other. We have no scientific measure of whether an individual can control himself—it is this limitation that prompted removal of the volitional prong of the insanity defense during the insanity defense reform in the early 1980s.\(^{162}\) Perhaps what led the Court in Crane to avoid articulating a more precise standard was the very impossibility of doing so. The problem was not that constitutional safeguards were not always best enforced by precise bright line rules—though that is probably true. The problem was simply that it was impossible to construct

\(^{157}\) Id. at 415.
\(^{158}\) Morse, Uncontrollable Urges, supra note 48, at 1033.
\(^{159}\) Crane, 534 U.S. at 413.
\(^{160}\) Hamilton, supra note 106, at 501-02. Hamilton points out that unlike determinations of insanity or competency which employ objective criteria such as knowing, understanding, or communicating, “volitional standards provide no such foundation upon which fact-finders can base their decisions.” This is the reason why “irresistible impulse” standards have been adopted and then rejected in the past. Id.
\(^{161}\) Morse, Uncontrollable Urges, supra note 48, at 1062.
\(^{162}\) Id. at 1062-63.
any rule, bright line or otherwise. The fact that the standard is unworkable is testified to by the fact that appellate courts have exploited the ambiguity in Crane to effectively disregard it by not imposing the added due process requirement of lack of control.163

There have been some academic attempts to provide alternative standards that act as workable substantive limits on civil commitment. The most notable of such attempts has been by Stephen Morse, who puts forward the “lack of the capacity for rationality” test.164 Morse argues that the “control” language in Hendricks and Crane is better understood in terms of rationality defects. The idea that lack of the capacity for rationality is the central non-responsibility criterion is easily defensible, and is eloquently argued by Morse. However, this is little more than a restatement of the principle of criminal interstitiality that was discussed earlier in this article. Morse acknowledges this by stating that the eligibility for punishment and the eligibility for involuntary civil commitment are mutually exclusive.165

To summarize, the problem with the lack-of-control standard is one of line-drawing. Refinements of this standard (such as the one put forward by Morse) only draw the line where it is drawn in the criminal law, thus equating the lack-of-control standard with the principle of criminal interstitiality. This principle obviously cannot be a possible limiting principle for our current system of sex offender commitment, because this is the very principle that was abandoned by the new generation of sex offender commitment laws. Thus, while the Supreme Court’s attempt in Crane to construct a non-responsibility standard is a step in the right direction, that direction can only lead to a scenario in which the lack-of-control standard (having been defined in terms identical to the principle of criminal interstitiality) is intrinsically incapable of justifying our present system of sex offender commitment.

IV. SEX OFFENDER RECIDIVISM AS A POTENTIAL POLICE POWER JUSTIFICATION?

In the previous parts, this article outlined the problems that result from the fusion of the parens patriae power and the police power in the context of sex offender commitment. Both the mental abnormality/per-
sonality disorder standard (upheld in Hendricks), and the lack-of-control standard (added in Crane) fail to provide workable limits for civil commitment. This part explores the possibility that principled limits to sex offender commitment may be grounded in the state's police power alone.

Many commentators have argued that sex offender commitment should be based on dangerousness, and that mental disorder is irrelevant. In fact, many have gone on to state that mental disorder actually confuses the issue of dangerousness by placing restrictions on who can qualify for commitment. The argument against this position is simply that commitment based on dangerousness would be a system without any substantive limits, and would therefore lead to a "slippery slope" problem. However, can there be a counterargument that justifies sex offender commitment based on unusually high rates of recidivism (as compared to other categories of offenders)? Can the dangerousness of sex offenders as a unique category of offenders act as a substantive limiting principle in itself? Of course, even if this were true, it would not justify the present sex offender commitment statutes (which require mental abnormality/personality disorder as threshold requirements), but it would justify the end result of these statutes (which is essentially commitment based on dangerousness, since mental abnormality/personality disorder are illusory criteria, and the lack-of-control standard can either be ignored or applied in a way where it reflects subjective assessments of dangerousness). Essentially, the circularity of the mental abnormality definition and the over-inclusiveness of mental abnormality and personality disorder lead to an illusory standard. In practice, civil commitment of sex offenders is based on the assessment of dangerousness. Therefore, a discussion of sex offender recidivism becomes extremely important; establishing that sex offender recidivism is completely different from recidivism amongst other categories of offenders is the only conceivable limiting principle in our current system of civil commitment.

The empirical literature on sex offender recidivism is vast and often conflicting. The diversity of sex offender recidivism studies makes the generalization of results somewhat difficult. A structured analysis of the literature on recidivism from the perspective of potential justifications for civil commitment requires a considerable amount of dis-

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166 For a detailed exposition of this view, see Roxanne Liev et al., Sexual Predators and Social Policy, 23 CRIME & JUST. 99 (1998).
167 See supra note 18.
ambiguation. In attempting such a structured analysis, I discuss the following: appropriate outcome measures, the importance of disaggregating categories of sex offenders, appropriate follow-up periods for recidivism studies, overall recidivism rates of sex offenders, and how low base rates of recidivism undermine predictive accuracy.

The first point to consider is the appropriate outcome measure for recidivism studies. Recidivism can be defined in several ways, and recidivism rates are naturally a function of the definition adopted. Most recidivism studies use reconviction as the outcome measure. This has two problems: First, sex offenses have very low reporting rates (significantly lower than other offenses) and a reconviction measure does not capture unreported sex offenses. Second, even amongst the reported sex offenses, many offenses are plea-bargained down to non-sexual offenses (such as assault). On account of both these factors, it is often argued that reconviction is not a good measure of sex offender recidivism. Critics point to the fact that the statutory language in sex offender commitment statutes does not restrict itself in any way to only those likely to be convicted of a sex offense. For example, the Kansas statute refers to “repeat acts of sexual violence.” This phrase would seem to include all those likely to commit an act of sexual violence, without regard to whether they were ever reported to the police, arrested, charged, or convicted. As one might expect, recidivism rates with this broader outcome measure are likely to be much higher. But can a statute choose any outcome measure on the basis of which it then frames the police power calculus? If an offender is placed in a certain category whereby the risk of reoffending is 30%, but the risk of reconviction is only 5%, what outcome measure should be used, and does the choice of outcome measure have broader implications? Clearly, if the

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168 See supra notes 17 & 19 and accompanying text.
169 Falshaw, supra note 17.
171 Greenberg mentions these factors and suggests that because of these limitations, recidivism rates are more appropriately thought of as relative recidivism rates and not absolute recidivism rates. See David M. Greenberg, Sexual Recidivism in Sex Offenders, 43 CANADIAN J. PSYCHIATRY 460 (1998). With respect to under-reporting, there is ambiguous evidence on the reliability of self reporting by sex offenders. See supra note 19 and accompanying text. However, Greenberg notes that with increasing awareness and public sensitivity to sexual abuse, the problem of under-reporting will gradually shrink over time.
172 KAN. STAT. ANN. § 59-29a02(a) (2005).
person is committed on the basis that there is a 30% chance that he will reoffend, he actually suffers confinement even though there is only a 5% chance that he would have been reconvicted. Commitments on the basis of dangerousness, by definition, effectively confine a person for something that he is going to do in the future. However, what is not quite as evident is that if the outcome measure that is employed is broader than reconviction, then commitment based on dangerousness applies a more diluted standard to confine someone than would otherwise have been applied. Had he not been committed and had eventually reoffended, he would most likely not have been punished and confined. This may not be objectionable per se, but it must be noted. By providing a statutory basis for a broader outcome measure, we are implicitly applying a lower standard for confinement. We thus attempt to solve the problems of under-reporting and plea bargaining through the backdoor. Intuitively, this seems like a good thing. Once we accept that commitment based on dangerousness is acceptable in principle, there seems to be no reason to limit such commitment only to those cases where the law would later have pronounced that a person committed a sexually violent act (i.e., reconviction). However, while I find it hard to take a position on this issue, I feel compelled to point out that the view outlined above seems overly simplistic. We must recognize that in using broader outcome measures, we are using extra-legal evidence to support legal confinements. Whether this is desirable or not depends on the strength of the extra-legal evidence that is used. At the same time, however, one may argue that since commitment is not punishment, it does not matter whether the person would have been found guilty of an offense—all that is relevant is that he would have committed one. The non-punitive nature of civil commitment may provide the necessary basis for applying a lower standard. Nevertheless, whichever view one takes, the significance of lowering the standard for confinement is often hidden by the superficial distinction between civil commitment and punishment.

The other relevant issue in determining the appropriate outcome measure is whether recidivism should include only sexual recidivism or both sexual and non-sexual recidivism. The current statutes clearly re-

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173 By this term, I refer to evidence that would not have led to a legal response (either because it would never have been reported or for whatever other reason).
strict the assessment of dangerousness to sexual recidivism. Indeed, because the future conduct is causally connected to a mental abnormality, it may seem that sexual recidivism is the only outcome measure that the statutes can credibly support. However, mental abnormalities or personality disorders can be of many kinds, some of which can make a person prone to both sexual and non-sexual violent offenses. The crucial question is whether sex offenders are a distinct category of offenders. To what degree is there offense specialization in sex offenders? Are sex offenders criminally versatile or do they restrict themselves to committing sex offenses or perhaps only one particular kind of sex offense? Also, are there different explanations for sex offending such that both criminal versatility and recidivism depend on the motivating factors for offending in the particular case? Most literature supports the conclusion that there are two categories of sex offenders: one that commits exclusively sex offenses and another that is criminally versatile (they commit both sexual and non-sexual offenses). In terms of motivating factors, literature in the psychiatric field supports the finding that sex offenders are either impulsive or ritualistic. Impulsive offenders are generally criminally versatile, whereas ritualistic offenders generally commit exclusively sex offenses. These classifications only emphasize the importance of disaggregating sex offenders while studying recidivism. In fact, even a similar class of sex offenders can have varying rates of recidivism depending on the underlying motivation. Given that there is a

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175 In the case of impulsive offenders, fantasy plays little or no role—the motivation is not sexual. These offenders usually have a diverse criminal history, and for them, a sex offense is just another offense. They also tend to use excessive violence. Ritualistic offenders are less common and more sophisticated. There can be different relational fantasies, and the level of violence depends on the fantasy/motivation. These offenders generally display paraphilic behavior, and have an exclusive sexual offense history (although there may also be some related offenses such as burglary if a person is caught in the victim’s home just before the crime). For a detailed analysis of the classification of sex offenders into impulsive and ritualistic offenders, see Robert R. Hazelwood, The Sexually Violent Offender: Impulsive or Ritualistic?, 5 Aggression & Violent Behav. 267 (2000).

176 For example, rapists are generally more criminally versatile than child molesters. See Liev et al., supra note 166.

177 For example, is child molesting reflective of pathology or criminality? Most psychological studies suggest that it is reflective of pathology, but empirical work reveals that child molesters do not have an exclusively sexual offense history—and that child molesting is a pattern of criminality in general. In an article that examines whether these accounts are consistent, Canter, Hughes and Kirby divide the child molester population into three types of interaction with the
category of offenders who are criminally diverse (and may have some impulsive control disorder), it is certainly plausible that mental abnormality/personality disorder can justify both sexual and non-sexual violent recidivism as an outcome measure. Moreover, in this chapter, I am considering a purely police power justification for civil commitment. If civil commitment is based on dangerousness alone, then the outcome measure should not be restricted to sexual recidivism only. A person who commits a sex offense may be dangerous either because he is likely to commit more sex offenses or because he is likely to commit non-sexual offenses; both are of equal importance in determining the police power calculus. Excluding nonsexual offenses is an example of how the mental disorder rhetoric can confuse the issue of dangerousness.

Just as outcome measures can influence recidivism rates, so can the selection of the follow-up period. Recidivism rates vary as a function of the follow-up period—with the rates naturally being higher when the follow-up period is longer. But can recidivism rates with any follow-up period be used to support an argument for civil commitment of sex offenders? In my view, an offense that is likely to take place in the immediate future more easily supports an argument for civil commitment than one that is expected to take place in the long term. The follow-up periods in recidivism studies that seek to support civil commitment should, accordingly, be relatively short. This can easily be explained as follows. Once we accept the bipolar police power calculus (which we have implicitly accepted in our discussion of commitment based on purely recidivist concerns), the two sides that must be weighed against each other are: on the one hand, the benefit gained by avoiding an offense, and, on the other, the harm caused by deprivation of the

178 If mental abnormality and personality disorder are understood in their widest possible sense (where they are purely explanatory of certain patterns of conduct), then while commitment is based on dangerousness alone, it can be rephrased to suggest that the mental abnormality or personality disorder is what causes both the sexual and non-sexual recidivism.

179 Statutory language generally does not suggest that the concern is only with reoffending within a certain time period, and it can therefore be interpreted as supporting life long follow-ups. See Nicole Yell, The California Sexually Violent Predator Act and the Failure to Mentally Evaluate Sexually Violent Child Molesters, 33 GOLDEN GATE U. L. REV. 295, 314 (2003) (reference to “sexual predatory act” suggests that it can be any time in the future).
liberty of the offender. Since the benefit is constant (one less sex offense), and the harm increases with every passing day of deprived liberty, if the recidivating event were to occur beyond some unspecified point in time, the commitment would no longer be desirable as per the calculus. There is no way of actually determining that exact point in time, because the benefit and the harm cannot be quantified in a way where they can be weighed against each other (as the calculus should demand). But in a theoretical sense, this leaves us with the intuition that follow-up periods for determining recidivism cannot be as long as empiricists might like them to be if they are to meaningfully support police power justifications for our current laws of civil commitment.

In the above analysis, consideration of the magnitude of harm caused by a sex offense is an element that is conspicuously absent. If the harm caused by a sex offense was, in some theoretical sense, infinite, then indefinite follow-up periods could possibly be justified. Therefore, our analysis also requires us to consider the magnitude of harm caused by a sex offense. Some authors have expressed this as the distinction between dangerousness and risk: “[t]he latter simply refers to the likelihood of a person’s committing any future harmful act, while the former combines the likelihood of a future harmful act’s being committed with a perception of how serious that harm is considered to be.”180 Clearly, an analysis of recidivism as a potential justification for commitment cannot be neutral to the extent of harm that would be caused by a recidivist act. The reason I do not explore the extent of harm in detail is simply because there seems to exist a general consensus that sex offenses (especially rape and child abuse) are extremely serious. The unique role of gender and sexuality, and the psychological impact on victims make sex crimes different from other classes of offenses. Sex crimes are personally invasive in a way that other crimes are not.

There has been a considerable amount of literature on the notion of sex crimes being a constructed category of crimes, in the sense that the forms of sexual coercion that are characterized as transgressive or normative vary with prevailing socio-cultural norms.181 This is certainly true of sex crimes, as it is true of other crimes. In fact, the category of

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180 Petrunik, supra note 3, at 45.
181 For a detailed study of the perception of child abuse and the child molester in North America in the twentieth century, see Jenkins, supra note 119. For an account that draws on history, literature, and art to try and discern the changing cultural norms about sexuality in the period between the Renaissance and Enlightenment, see William Naphy, Sex Crimes: From Renaissance to Enlightenment (2002). See also Ronald Holmes, Sex Crimes (1991).
crime must necessarily be linked to socio-cultural norms, if it is to serve its purpose of laying down the boundaries of acceptable behavior in society. What is different about sex crimes as compared to other crimes is that our views about acceptable forms of sexual conduct have been changing at a much more rapid pace than our views about other kinds of behavior. Behavior that was once criminalized (e.g., homosexuality)\textsuperscript{182} is now legal, and that which was once fairly commonplace in some societies is now criminalized (e.g., sexual relations with children).\textsuperscript{183} This, however, should not lead us to doubt whether our present convictions are misplaced. Legal responses must be based on our present convictions, even if those convictions are rapidly evolving. All that this suggests is that legal responses must also rapidly evolve. Besides, the evolving nature of sex offenses is only relevant for determining what constitutes a sex crime. Once a certain form of behavior is categorized as transgressive of present day norms, it is generally viewed as extremely serious.\textsuperscript{184}

So far, I have considered certain factors relevant to understanding recidivism rates for the purpose of sex offender commitment. From the above discussion, there are some key points that emerge. First, we must be aware of the significance of using an outcome measure broader than reconviction. Second, both criminal versatility and recidivism amongst sex offenders vary depending on the motivating factors for offending. Sex offenders are not a homogenous category, and disaggregating sex offenders into sub-groups is extremely important to understand recidivism in the case of each class of sex offenders. Third, from a police power perspective, there is no apparent reason why we should only be concerned with sexual recidivism. By restricting itself to sexual recidivism (largely because of the idea that a mental abnormality or personality disorder is constitutive or reflective of sexual deviance), the Kansas Sexually Violent Predators Act\textsuperscript{185} does not help its own cause. Even if we were to accept the mental abnormality framework, it is a sufficiently

\textsuperscript{182} In England, for example, homosexuality became legal in 1967. See TERRY THOMAS, SEX CRIME: SEX OFFENDING AND SOCIETY (2000).

\textsuperscript{183} Jenkins points out that the idea of playing with a child's genitals was fairly commonplace in the time of Louis XVI. See JENKINS, supra note 119, at 14.

\textsuperscript{184} The argument for longer follow-up periods generally hinges on the seriousness of sex offenses. While I accept this argument, clearly the harm caused by sex offenses is not infinite and there must be some limits to appropriate follow-up periods for determining recidivism rates for the purpose of commitment.

\textsuperscript{185} KAN. STAT. ANN. § 59-29a01 to -29a21 (2005).
broad category to include motivating factors (such as impulse control disorder) that may lead to either sexual or non-sexual offenses. Fourth, if recidivism amongst sex offenders is to meaningfully form a justification for civil commitment, shorter follow-up periods are more consistent with this purpose. Having considered these various factors, I now turn to some recent literature on sex offender recidivism.

Before looking at some of the empirical studies on recidivism, it is worth mentioning some data from the U.S. Department of Justice. The Department of Justice came out with a report on the recidivism of sex offenders released from prison in 1994. The report found that the recidivism rate amongst sex offenders was 5.3% (for another sex crime) and 43% (for any crime). In contrast, the recidivism rate for non-sex offenders was 1.3% (for a sex crime) and 68% (for any crime). Thus, while it is true that sex offenders have a higher recidivism rate if one includes both sex offenses and non-sex offenses, this overall recidivism rate is still lower than that for non-sex offenders. Besides, the recidivism rate (as opposed to recidivism, which included rearrest, reconviction, and reimprisonment) for sex offenders was only 3.5% for another sex crime, and 24% overall.

Studies on sex offender recidivism generally show higher rates of recidivism than those reported by the U.S. Department of Justice. The most sophisticated technique for understanding sex offender recidivism is meta-analysis. The most recent and comprehensive meta-analysis was conducted by Hanson and Bussiere, and included sixty-one research studies. Across all the studies, the sex offense recidivism rate was 13.4% and the recidivism rate for a sex offense or a violent offense was 25.6%. The average sex offense recidivism rate was 18.9%

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186 In 1994, 272,111 prisoners in 15 states were released from prison. See Office of Justice Programs, U.S. Department of Justice, Bureau of Justice Statistics: Criminal Offenders Statistics (Nov. 13, 2005), http://www.ojp.usdoj.gov/bjs/crimoff.htm#recidivism. Of these, 9,691 (3%) were sex offenders. The measures of recidivism were rearrest, reconviction, and reimprisonment.

187 Id. This was over a three year follow-up period. Most studies typically use much longer follow-up periods than this.

188 See, e.g., infra notes 190 & 194.

189 Meta-analysis relies on a quantitative approach to synthesizing research results from similar studies. The main advantage of this technique is that it neutralizes the sampling bias of studies and generates results that can be more easily generalized. See http://www.csom.org/pubs/recidsexof.html (last visited Apr. 6, 2006).

for rapists and 12.7% for child molester. The rate of recidivism for non-sexual violent offenses was 22.1% for rapists and 9.9% for child molesters.\textsuperscript{191} The overall recidivism rate (for any offense) was 46.2% for rapists and 36.9% for child molesters.\textsuperscript{192} This overall recidivism rate is quite similar to that reported by the U.S. Department of Justice (43%).\textsuperscript{193} The measure of recidivism was rearrest or reconviction, and the follow-up period was four to five years. The meta-analysis reveals that rapists are consistently more recidivist than child molesters. However, this is strongly contested.\textsuperscript{194} A possible reconciliation of these different results can be based on the differences in follow-up periods. Child molesters and rapists tend to have the same long-term recidivism rates.\textsuperscript{195} In fact, child molesters often have higher recidivism rates in the long term.\textsuperscript{196} Rapists, however, typically show higher recidivism rates if shorter follow-up periods are used.\textsuperscript{197}

In summary, there are a few points to be noted from the literature. First, overall recidivism rates for sex offenders are not higher than those for non-sex offenders. In fact, Department of Justice figures suggest they are lower. Sex offenders may commit either sexual offenses or non-sexual violent offenses—both of which should be of concern to us. In the case of rapists, studies suggest that they are more likely to reoffend with a violent offense than a sex offense. Rapists and child molesters have similar long-term recidivism rates (long-term recidivism is probably higher for child molesters), but rapists generally have higher recidivism rates in the short term, which may be indicative of an acute problem of under-reporting of child molesters. To counter the problem of under-reporting, many studies advocate the use of extremely long follow-up periods\textsuperscript{198} (on the assumption that over very long periods, reoffending

\textsuperscript{191} This means that rapists were more likely to reoffend with a violent offense than a sex offense.
\textsuperscript{192} Hanson & Bussiere, \textit{supra} note 190, at 351.
\textsuperscript{193} \textit{Id.} at 351.
\textsuperscript{195} \textit{Id.}
\textsuperscript{196} Prentky used a 25 year follow-up period and found a 39% recidivism rate amongst rapists (outcome measure being charge), and a 52% recidivism rate amongst child molesters. \textit{Id.} For a review of Prentky's findings, see John M. Fabian, Kansas v Hendricks, Crane and Beyond, 29 WM. MITCHELL L. REV. 1367, 1427-30 (2003).
\textsuperscript{197} This may be because under-reporting is a more acute phenomenon in the case of child molesters.
\textsuperscript{198} See, e.g., Roderic Broadhurst & Nini Loh, \textit{The Probabilities of Sex Offender Re-arrest}, 13 CRIM. BEHAV. & MENTAL HEALTH 121 (2003).
will be reflected in at least one reconviction). However, I have already argued that recidivism rates based on extremely long follow-up periods do not support a police power justification for civil commitment. The recidivism rate over a medium term follow-up period (such as four to five years) for sexual or non-sexual violent offenses (both of which should properly be the subject of our concern) is around 25%.

A recidivism rate of 25% is not startlingly high. In fact, it can be described as a low base rate of recidivism. The final part of this section seeks to outline how low base rates of recidivism undermine predictive accuracy. Prediction of dangerousness is at the center of sex offender commitments, and such prediction has been found to be constitutional. However, Janus and Meehl point out that "at some point the validity of prediction testimony becomes so attenuated that it is ineffective to establish the requisite certainty of harm to make the state’s interest in preventing that harm ‘compelling’" (thus resulting in a violation of the due process clause). In a fascinating and extremely instructive article, Janus and Meehl attempt to discern the de facto probability standards applied by commitment courts. I shall briefly summarize the key points made in that article.

Most sex offender commitment laws require a showing that future violence is "likely." The Minnesota State Supreme Court has interpreted this to mean "highly likely." Similarly, the Washington Supreme Court has interpreted "likely" to mean that the "likelihood of reoffense is extremely high." In upholding the Wisconsin statute, which requires a "substantial probability" of future sexual violence, the Wisconsin Supreme Court interpreted this to mean "most likely" to engage in sexual violence. Thus, courts, in their effort to uphold sex offender commitment laws, have generally applied high probability standards. These standards are often higher than would be apparent from a

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199 See Hanson & Bussiere, supra note 190.
200 Sex offender commitment laws have generally been upheld as being constitutional by most state supreme courts where they have been challenged. Only one state supreme court and one federal district court have struck down such laws, and neither of those courts based their holding on predictions. See Eric Janus & Paul Meehl, Assessing the Legal Standard for Prediction of Dangerousness in Sex Offender Commitment Proceedings, 3 Psychol. Pub. Pol'y & L. 33, 35-36 (1997).
201 Id. at 37.
202 Id.
203 Id. at 40.
204 Id.
205 Id.
plain reading of the statute. Janus and Meehl argue that the de facto standards actually used by courts are far lower than the probability standards that courts claim are in use.206

To understand probability standards, it is important to recognize that probability statements about individuals are really statements about groups or classes of people to which the individual is asserted to belong. So, saying that X has a 50% chance of reoffending amounts to nothing more than saying that X belongs to a class of persons where one in every two people will reoffend. Janus and Meehl refer to this group of persons as the “commitment class.”207 The appropriate standard for analyzing commitment cases is a composite of the standard of proof and the standard of commitment; the standard of proof relates to the accuracy of the prediction, and the standard of commitment relates to levels of recidivism in the commitment class. Janus and Meehl offer a simple example to illustrate a common error. If there is a class with a 75% recidivism rate, and accuracy of prediction is 80%, it may be intuitively appealing to multiply the two to arrive at a net probability of recidivism (composite standard) of 60%. However, this approach ignores the interaction between accuracy of prediction and base rates of violence.208 Janus and Meehl explain this interaction with the following example:209

The interaction of base rates and accuracy is somewhat counterintuitive. The following examples may help clarify the concepts. Suppose a scientist has developed a blood test that can detect cancer with 99% accuracy. In other words, in 99 out of every 100 administrations of the test, the result correctly indicates whether or not the individual has cancer. The results of the test are erroneous in only 1 of 100 administrations. Suppose the test is administered to 1,000 individuals (the screening group). A group of individuals test “positive” on the test, an indication of cancer. What is the probability that these individuals actually have cancer? The answer is not 99%. Rather, the answer depends on the base rate, or prevalence, of cancer in the group to which the test was administered.

206 While courts make no effort to quantify these standards, Janus and Meehl rely on certain references to quantify a “likely” standard as a 50% likelihood and an “extremely likely” standard as a 75% likelihood. See Janus & Meehl, supra note 200, at 41.
207 Id. at 42.
208 For a detailed analysis of this interaction in the context of sex offender commitment, see Dennis Doren, Evaluating Sex Offenders: A Manual for Civil Commitments and Beyond 145-60 (2002).
209 Janus & Meehl, supra note 200, at 48.
Consider two scenarios. Suppose only 1 in the 1,000 members of the screening group actually has cancer (i.e., suppose the base rate for cancer is 1 in 1,000). The test, being 99% accurate, will almost certainly correctly identify the one cancer victim as positive for cancer. But recall that the test errs in 1% of the cases. Thus, as the test is administered to the 999 individuals who do not have cancer, it will incorrectly identify 1% of them (9.9 individuals) as positive. Rounding, we observe that the test will identify 10 cancer-free individuals as positive for cancer. Thus, the test has identified a total of 11 individuals as positive for cancer, but only 1 truly has cancer. Thus, the probability that any of the 11 “positives” actually has cancer is only 1/11, or about 9%.

Now consider a second scenario. Suppose that the test is administered to a group with a known prevalence of cancer of 50%. The test will correctly identify 99% of the 500 cancer patients (495), but it will err on 1% of the 500 cancer-free individuals (5), identifying them as cancer victims. Thus, the test will show 500 positive for cancer (495 + 5). The probability that any one of those 500 actually has cancer is 495/500 or 99%.

It is clear from these examples that the probability of a result being true depends on the base rates of the group. In the context of recidivism, this would mean that the probability of a dangerousness prediction, even if reasonably accurate, would depend on the levels of recidivism in the commitment class. A low base-rate of recidivism means that there is a large sub-group which will not reoffend, and this tends to magnify any errors in prediction.

Janus and Meehl then review literature on the accuracy of prediction and on recidivism rates to try and arrive at a standard of commitment actually in use. They suggest that a standard of commitment of 50% (i.e., a “likely” standard) is possible, but only under favorable conditions (with levels of accuracy being 70% and levels of recidivism being above 30%). Janus and Meehl state that the actuarial methods of prediction combined with clinical adjustments can, at best, have an accuracy of 75%. Levels of recidivism, as I pointed out earlier, are probably lower than 30%, even if one includes both sexual and violent...

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210 Id. at 55.
211 Id.
offenses. Thus, the standard of commitment used by courts is well below the “extremely likely” standard that is purportedly in use.

Thus, even if our levels of predictive accuracy are seemingly high, this is undermined by low base-rates of recidivism in the group of persons by reference to which the probability is determined (i.e. the commitment class). The recidivism of sex offenders fails to support a police power justification on two counts: first, it is not apparent that levels of recidivism for sex offenders are any higher than those for non-sex offenders; and second, even though predictive accuracy is fairly high, low base rates of recidivism result in a standard for commitment that is too low to warrant such deprivations of individual liberty.

Conclusion

Over the last decade, the passage of sexually violent predator statutes by several state legislatures has been a constant source of debate. A fair amount of recent scholarship has been dedicated to whether such statutes are justifiable. In general, the scholarship on this issue seems polarized between those who support sexual predator laws based on a crime control imperative, and those that oppose it on libertarian grounds. But the nature of sexual predator laws, the multiple potential justifications for such laws, and the tendency of courts to try and tackle issues of dangerousness by using jurisprudence developed in the context of general civil commitment, make justifying these statutes increasingly complicated. To comprehensively address this issue, we need to break it down into several smaller questions; for example, what is mental illness, how is mental abnormality any different from mental illness, how important is treatment in justifying civil commitment, what is the role of lack of control, are recidivism rates for sex offenders different from other categories of offenders, should such rates include sexual and non-sexual violence, what is the appropriate follow-up period, do low base rates undermine predictive accuracy? In this article, I have attempted to deal with each of these questions individually. Through my research, I have often marveled at how most authors answer each of these questions in a manner that reinforces their overall view of the issue of sex offender civil commitment. This article does not adopt such an approach. The result is not intellectual inconsistency, but rather, ideological neutrality. Analytically, there is nothing in the preceding questions that demands they

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212 Supra note 190 and accompanying text.
be answered in a manner which reinforces an overall view on the desirability of sexual predator laws. For example, I argued in this article that recidivism rates should include both sexual and non-sexual recidivism. This view is likely to translate into higher rates of recidivism and a stronger case for commitment. At the same time, however, I argued that follow-up periods should be short- to medium-term, a view that translates into lower recidivism rates, and, consequently, a weaker case for commitment. Of course, this approach makes the overall question much harder to answer. I feel hesitant to arrive at a single conclusion. Therefore, this article advances a range of possible conclusions.

The first conclusion is that civil commitment is subject to the principle of criminal interstitiality. According to this principle, the post-incarceration commitment of sex offenders is indefensible per se. If we accept this argument, the only way to deal with the problem of dangerousness is through the criminal law, and the sex offender problem should be addressed by having longer sentences.213

The second conclusion—the one adopted by the Supreme Court in Hendricks—suggests that the statutory requirement of a mental abnormality that is likely to make an individual reoffend sufficiently narrows the class of persons who may be subject to commitment. However, as has been discussed in this article, mental abnormality/personality disorder is an illusory standard. It is only explanatory of certain patterns of behavior, and when defined by reference to that behavior, it becomes circular, broad, and meaningless. Essentially, the Supreme Court in Hendricks validated police power commitments.

The third potential limiting principle is the lack-of-control standard. Recognizing that its decision in Hendricks was perhaps overbroad, the Court in Crane required a separate finding of lack of control. However, this standard was unworkable at a practical level, and has been ignored by most lower courts. Besides, the lack-of-control standard is effectively a proxy for a non-responsibility standard. Therefore, this again raises the question of how someone can be non-responsible for the purpose of commitment, but responsible for the purpose of criminal culpability. Essentially, the lack-of-control argument collapses into the principle of criminal interstitiality.

213 However, this assumes that incapacitation is a valid goal for criminal law. There are those that argue that it is not. See, e.g., Paul Robinson, The Criminal-Civil Distinction and the Utility of Desert, 76 B. U. L. Rev. 201 (1996).
For many, the analysis would end by concluding that none of the above standards work. In this article, I examined whether pure police power commitments can be justified based on the fact that recidivism rates for sex offenders are significantly higher than recidivism rates for other categories of offenders. Because sex offender recidivism rates are not significantly higher, they cannot support a police power justification.214

Thus, the search for a limiting principle is inconclusive. The strongest limiting principle remains the principle of criminal interstitiality—one that is in complete opposition to sexual predator laws. One could argue that subjecting ourselves to this principle means that we have no way of dealing with dangerous offenders, because making incapacitation a goal of the criminal law is riddled with its own problems. However, quite apart from that, it is not clear whether sex offenders are indeed all that dangerous in terms of recidivism.

The present debate about sex offender statutes can be cast in the following terms: Dangerousness needs to be dealt with somehow. Either we can make incapacitation a goal of the criminal law, or we can construct a convoluted civil commitment system and medicalize the problem of dangerousness in sex offenders. In the case of the criminal law, the fact that incapacitation is the goal is more honestly admitted. In the case of civil commitment, most of the legislative history and court decisions are part of an effort to resist this admission. The reasoning of courts and the nature of sexually violent predator statutes have several failings that arise, in part, because they are not honest to their purpose. However, there may be a larger problem altogether; the purpose itself may be flawed. In this article, I have looked at ways in which courts have tried to disguise the issue of dangerousness as one of mental illness. Finally, after examining the issue of sex offender dangerousness, this article concluded that there needs to be much more research before we can conclude that civil commitment of sex offenders is justified. I have, in some ways, suggested what considerations should inform such research. As such, I hope that I have left this issue open for more structured analysis by later scholars.

214 Even if we can accurately predict recidivism, overall accuracy is undermined by low base rates of recidivism.